FILE COPY

FILED

SEP 19 1972

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-454

OF WALBURGA HEDRICK,

Petitioner,

vs.

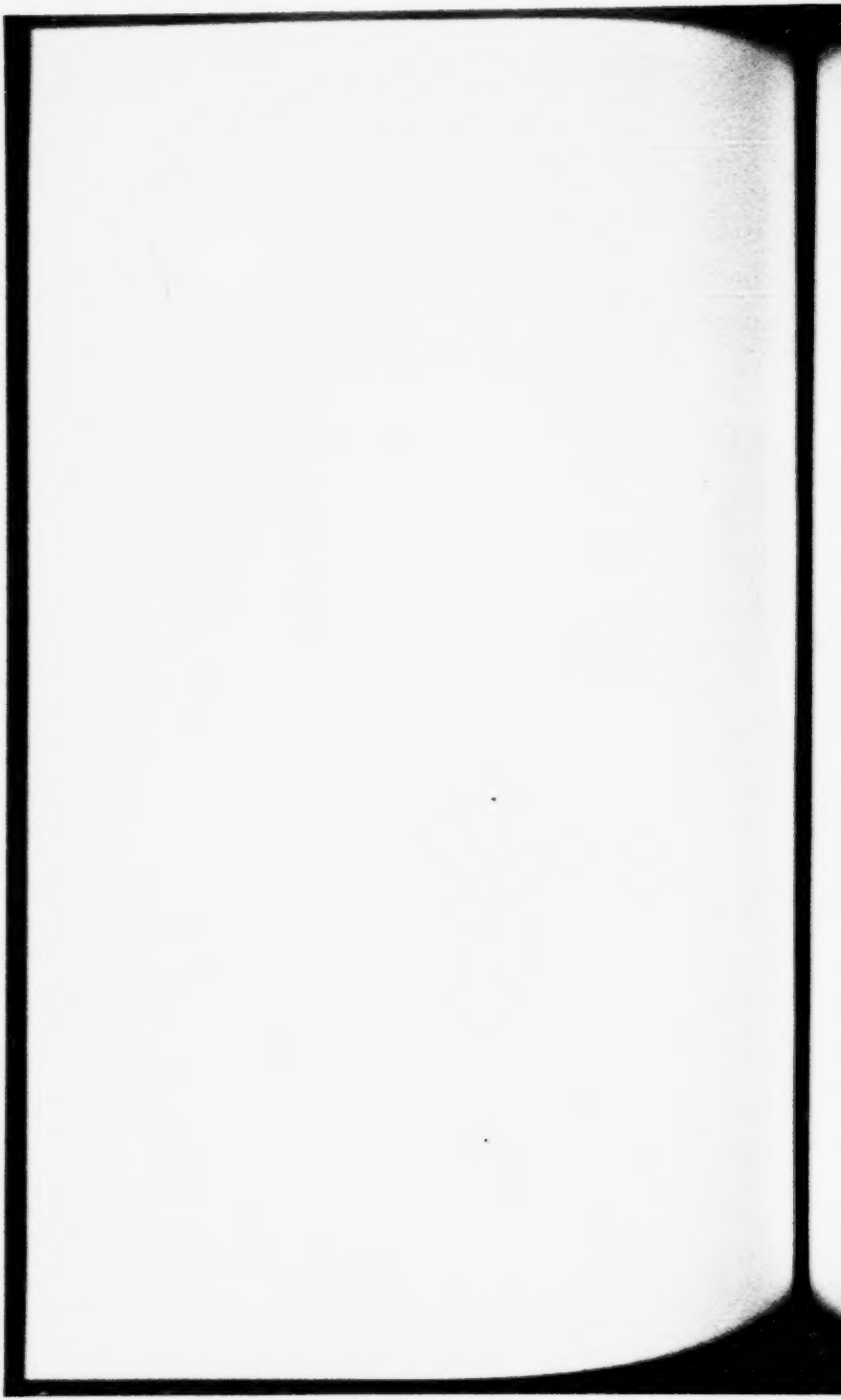
COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

CHARLES I. ROSEN,
408 South Spring Street,
Suite 501,
Los Angeles, Calif. 90013,
(213) 628-7020,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 749-6622



SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

California and Federal Statutes and California Constitution 6

Constitution of the State of California, Article XX, Section 22 10

California Civil Code. Section 1916.2—Maximum Rate of Interest; Compound Interest; Effect of Contract Provisions for Excessive Interest 11

1916.1—Usury Law—Section 1916, Civil Code, State of California 11

Section 336—California Code of Civil Procedure 12

Statement of the Case 12

Reasons for Granting the Writ 18

I.

A Decision of a Court of Appeals Does Not Become the Law of the Case, so as to Bar Further Consideration of a Later Appeal in the Same Case After a Reversal 18

II.

The Order of the Court of Appeals Making a Previous Decision the Law of the Case, Approves a Decision in Violation of the Constitution of the State of California, and of United States Law 21

III. Page

By Permitting the Former Decision to Become Law of the Case, the Court of Appeals Approves a Violation of Constitutional Provision for Due Process, and for Validity of Ex Post Facto and Retroactive Application of Later Law 22

IV.

By Permitting 405 F. 2d 587 to Become the Law of the Case Violates the Integrity of the Decisions of the Courts of the United States in That It Disregards the Principle of Due Process and Res Judicata 24

V.

The Former Decision of the United States Court of Appeals Becoming the Law of the Case Approves a Violation of Established Law, Resulting in Unusual and Unrealistic Presumptions and Incurs a Great Injustice by Assuming Proration of Principal and Interest and Rate of Interest in Income Tax Computation Where None Is Stated in the Contract in Question so That the Interest Based on the Usurious Interest Rate Assumed Results in Amounts of Interest Greater Than the Installment Payments Provided for in the Contract, and Is in Excess of a Rate Later Provided for in a Later Enacted Internal Revenue Code Provision 25

VI.

The Rule of the Law of the Case Approves a Computation for Income Tax Assessment Based on a Presumed Indebtedness That Is Barred by the Statute of Limitations Assuming That Such Indebtedness Actually Existed, Which It Did Not 26

VII. Page

This Petition Should Be Granted and the Decision of the Court of Appeals Reviewed so That Conformity May Exist in the Decisions With Other Cases in the Same Circuit, in Other Circuits, and With the Supreme Court of the United States, and With Constitutional and Statutory Provisions of the United States, and Interpretation by the Various States of Its Own Constitution and Statutes 27

VIII.

The Co-Related Case, Commissioner v. Wilshire, 288 F. 2d 799, Which Is the Result of a Misrepresentation of the Record in the Case to the Court of Appeals, After Denial of Petition for Certiorari by This Court, Which Is the Sole Basis for Readjudication of Petitioner's Income Tax Treatment as Being a Change of "Legal Climate" From Oesterreich v. Commissioner, 226 F. 2d 798, and Which Has Not Been Favorably Cited in Any Later Case in the Manner of Computation of Income Tax, Should Not Be the Precedent and Law of the Case in This Instance Where the Court of Appeals Has Accepted That Case as the Precedent for the Case at Issue Here 29

IX.

If This Petition Is Not Granted Multiplicity of Suits and Extended Litigation Will Ensue 30

X.

The Petitioner Had Conformed to the Mandate in Supplying the Tax Court With a Computation Based on the Suggestion by the Court of Appeals and in Conformity to the Method of Computation Suggested by the Court 31

Conclusion 33

INDEX TO APPENDICES

Page

Appendix A. Petition to Review a Decision of the Tax Court of the United States .....App. p. 1

Appendix B. Memorandum Order 2

Appendix C. Opinion of the United States Court of Appeals for the Ninth Circuit 4

Appendix D. Opinion of the Court of Appeals for the Ninth Circuit 8

Appendix E. Order 18

Appendix F. Memorandum 19

Appendix G. Opinion of the Court of Appeals for the Ninth Circuit 21

Appendix H. Opinion of the United States Court of Appeals for the Ninth Circuit 24

Appendix I. Exhibit 18 as Part of Deposition of Robert Mason 28

Exhibit 19 as Part of Deposition of Robert Mason 33

TABLE OF AUTHORITIES CITED

Cases	Page
Broadcasting v. Dist. of Columbia, 313 F. 2d 554	24
Cochran v. UM&M Transit Co., 110 F. 2d 519	21
Commissioner v. Goodwin Crocker, 315 F. 2d 110	24
Commissioner v. Wilshire, 288 F. 2d 799	22
Commissioner of Internal Revenue v. Netcher, 143 F. 2d 484	21
Day v. Campbell, 256 So. 2d 105, 160 La. 35	20
Estate of Walburga Hedrick v. Commissioner, 406 F. 2d 587	1, 2, 16, 17, 27
Helvering, Commissioner v. Cronin, 106 F. 2d 907	24
Illinois Central RR Co. v. Saetz, 73 N.E. 585	21
Morey v. Ridell, 205 F. Supp. 918	24
Oesterreich v. Commissioner, 226 F. 2d 798	1, 16, 19, 22, 24, 25, 27, 29
People v. Medina, 6 Cal. 3d 484, 492 P. 2d 686 (1972)	20
Robinson v. Commissioner of Internal Revenue, 432 F. 2d 767	24
Shanahan v. United States, 447 F. 2d 1082	23
Sharp, Estate of (1971) 18 Cal. App. 3d 565, 95 Cal. Rptr. 816	21
State of California v. Day, 76 Cal. App. 2d 536	22
Transport Insurance Co. v. Employers Casualty, 470 S.W. 2d 757	20
United States v. Portland Cement, 413 F. 2d 161	24

Page

Weller v. Valles County, 2 N.W. 2d 606 20

Wilshire Holding Corp. v. Commissioner, 244 F. 2d 904 .....2, 16, 17, 19, 23, 27, 29, 30, 33

Wilshire Holding Corp. v. Commissioner, 262 F. 2d 51 .....2, 16, 27

Wilshire Holding Corp. v. Commissioner, 288 F. 2d 799 ..... 2, 16, 27, 29, 30

Wilshire Holding Corp. v. Commissioner, 355 U.S. 815 .....16, 27

Rules

Tax Court Rules, Rule 50 .....3, 31

Statutes

California Civil Code, Sec. 1916 11

California Civil Code, Sec. 1916.1 .....11, 21

California Civil Code, Sec. 1916.2 .....11, 21

California Code of Civil Procedure, Sec. 336 ....12, 27

California Code of Civil Procedure, Sec. 336a 12

California Constitution, Art. XX, Sec. 22 .....10, 21

Internal Revenue Code of 1939, Sec. 44(a) 8

Internal Revenue Code of 1939, Sec. 44(b) 8

Internal Revenue Code, Sec. 453 6

Internal Revenue Code, Sec. 453(a) 6, 7

Internal Revenue Code, Sec. 453(b) 7

Internal Revenue Code, Sec. 483 .....8, 22, 23, 30

Internal Revenue Code, Sec. 483(a) 8

Internal Revenue Code, Sec. 483(b) 8

Internal Revenue Code, Sec. 483(c) 9

Page

Internal Revenue Code, Sec. 483(d) 10

Internal Revenue Code, Sec. 483(e) 10

Statutes of 1919, Sec. 2, p. 83 11

United States Code Annotated, Title 26, Sec. 6601 2

United States Code Annotated, Title 26, Sec. 6601(a) 22

United States Code Annotated, Title 26, Sec. 6601(f) 22

United States Code Annotated, Title 28, Sec. 1254.. 2

United States Code Annotated, Title 28, Sec. 2074.. 2

Texts

Legislative History, p. 1919 12

Tax Coordinator, Sec. U 1101 Note No. 2, p. 16 26

IN THE

Supreme Court of the United States

October Term, 1972
No. .....

ESTATE OF WALBURGA HEDRICK,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The Opinion of the United States Court of Appeals on which petition is herein made, being Docket No. 26292 of said Ninth Circuit and is set out on Appendix page 1, *infra.*

Other and prior decisions relating to the treatment of the income of installment payments involved here and considered for income tax assessments, were rendered in the following decisions and opinions of the Court of Appeals (Ninth) as follows:

Oesterreich v. Comm'r., 226 F. 2d 798;

Estate of Walburga Hedrick v. Comm'r., 406 F. 2d 587, set out in Appendix *infra* p. 4;

Estate of Walburga Hedrick v. Comm'r., Memorandum Opinion on Docket 26292;

Wilshire Holding Corp. v. Comm'r., 244 F. 2d 904;

Wilshire Holding Corp. v. Comm'r., 262 F. 2d 51;

Wilshire Holding Corp. v. Comm'r., 288 F. 2d 799;

Wilshire Holding Corp. v. Comm'r., 355 U.S. 815; (cert. anni. denied)

Wilshire Holding Corp. v. Comm'r., 355 U.S. 879. (Rehearing denied)

Jurisdiction.

The Order and judgment of the U.S. Court of Appeals was rendered on April 14, 1972, and the Petition for Rehearing was denied on June 29, 1972. The action involves income Tax assessment, by the Commissioner of Internal Revenue. The Court has jurisdiction under 28 U.S.C.A. Section 1254 and Section 2074.

Questions Presented.

Is the Mandate in *Hedrick v. Commissioner*, 406 F. 2d 587, so specific so that it becomes the Law of the case after a reversal by the Court of Appeals, so Petitioner is barred from presenting an appeal resulting from a later retrial in the Tax Court, and do such circumstances exist with reference to the second Tax Court hearing so that the principle of the Law of the case is not applicable,

(1) When the case is reversed.

(2) When the mandate to the trial Court is general and not specific;

(3) When it suggests a rate of interest of 7% or 8%, or any other proper rate, and where the highest

rate permitted by the constitution of the state of California is 7% simple interest and makes 7% compound interest usurious, and the Tax Court approves such usurious rate of interest, seven percent compounded and when the Court of Appeals also says "There is no principle of Law which would preclude the Court from determining the proper rate for this case".

(4) When the mandate on reversal says in the opinion:

> "Here in Oesterreich (now Hedrick) No. 2, we must admit that the points on which the executor chose to defend have substantial merit. And they were not really covered or concluded in principle by any holding in the Wilshire cases, thus we cannot fault the estate for not presenting evidence or computations at the second Oesterreich (now Hedrick) tax court trial on a division between principal and interest" and Tax Court disregards the said statement.

Where there was a trial *de novo* in the Tax Court after the prior decision of the Court of Appeals, and new issues presented, and the Court made new findings and rendered a new opinion and decision based on such new trial.

When Petitioner followed the mandate and under Rule 50 of the Tax Court submitted new computations, allowing the highest legal rate of interest permitted by law, using the assumed principal taken for granted by respondent in all previous computations and also by the Court, and in addition thereto submitted a computation based on said maximum legal rate, being one of the interest rates suggested by the Court of Appeals, and so as to produce the greatest amount of permis-

sible interest to be taxed, in conformity with the Court of Appeals' opinion, increased the assumed principal portion of the contract so as to consume for the first ten years, 100% of the installment payments as interest so that it will be subject to full income tax treatment as ordinary income. This was in pursuance of the recommendation of the Court of Appeals, wherein it also said:

> "Of course the Court may determine what is the proper rate for the 'lease' independent of the Wilshire litigation. Taxpayer was not a party to the proceeding in which the twelve percent rate was set for Wilshire, and while the Commission is concerned that the revenue be not whipsawed by inconsistent determinations, there is, so far as we know, no principle of law which would preclude the Court from determining the proper rate for this case. The Government would have to absorb the difference between the twelve percent rate and any lower rate determined by the Court" (Note 3 by Court) "We do note that the original lease provided for 7% on delinquencies but that should not be necessarily determinative on the 68 year term".

It is necessary that this petition be granted to avoid multiplicity of suits and extended litigation.

When on a reversal and remand a trial Court is ordered to find a proper assumed rate of interest, is the trial Court following the remand order when it assumes a rate of interest in violation of the constitution of the State of California on usury, instead of finding a lawful rate permitted by law, and by the remand.

Is it a violation of due process and the constitutional provision against application of *ex post facto* law, to apply retroactively a new law to affect a prior transaction in order to arrive at a predetermined result.

Is it a violation of the integrity of the decisions of the United States Courts, of the principle of due process and *res adjudicata,* to disregard and redetermine the treatment of income for income tax purposes as set out in 1955 decision of the United States Court of Appeals, determining tax treatment from 1929 to 1948, for the same Court (9th), in 1972 to readjudicate the income tax treatment for the same income for the same years differently resulting in greater liability.

Whether a great injustice is done, is a violation of established principles of law, and is an unusual and unrealistic assumption, when determining proration of a sale contract for the purpose of income tax computation, where no interest is mentioned, to assume the portion of installment payments to be applied to principal and the rate of interest to be computed, to assume a principal and a rate of interest to be applied in excess of that permitted by the laws and constitution of the State, and regarded as usurious, and of the Internal Revenue Code of the United States, and where the monthly interest will be greater than the monthly installment payments provided for in the contract, so as to establish a fictitious income on which tax is to be computed and assessment of tax made.

Whether it is a violation of the state statute of limitations and of United States law to compute on a 1960 income tax assessment by the Commissioner of Internal Revenue, and for a United States Court to approve, a computation based on all moneys supposed to be received by taxpayer since 1929.

Should the variance in the holding of the United States Court of Appeals, with decisions of its own circuit, and other Courts in various districts and circuits, and the Supreme Court of the United States, and various state courts have the attention of this Court to establish conformity of decision and law.

Should a decision of the United States Court of Appeals resulting from a misrepresentation to the Court by a litigant in a co-related case, as to the state of the record, become a touchstone, a foundation for, and a precedent for conforming the case at issue to such decision resulting from a misrepresentation.

Is it a violation of due process for a Court to approve an income tax assessment by assuming in a contract where no interest or rate is indicated, of a rate far in excess of the normal rate and which is usurious, and to compute as income on such fictitional interest an income of $9000, when only $7500 is received, and to allow as a deduction to the payor of said income, $9000 yearly when it pays out only $7500.

California and Federal Statutes and California Constitution.

§453. Installment method

(a) Dealers in personal property.

(1) In general.—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may so turn as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(2) Total contract price.—For purposes of paragraph (1), the total contract price of all sales of personal property on the installment plan includes the amount of carrying charges or interest which is determined with respect to such sales and is added on the books of account of the seller to the established cash selling price of such property. This paragraph shall not apply with respect to sales of personal property under a revolving credit type plan or with respect to sales or other dispositions of property the income from which is, under subsection (b), returned on the basis and in the manner prescribed in paragraph (1).

(b) Sales of realty and casual sales of personalty.—

(1) General rule. Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding $1,000,

may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

(2) Limitation.—Paragraph (1) shall apply—

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953 (whether or not such taxable year ends after the date of enactment of this title), only if in the taxable year of the sale or other disposition—

(i) there are no payments, or

(ii) the payments (exclusive of evidences of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

(B) In the case of a sale or other disposition during a taxable year beginning before January 1, 1954, only if the income was (by reason of section 44(b) of the Internal Revenue Code of 1939) returnable on the basis and in the manner prescribed in section 44(a) of such code.

§483. Interest on certain deferred payments

(a) Amount constituting interest.—For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of a payment to which this section applies which bears the same ratio to the amount of such payment as the total unstated interest under such contract bears to the total of the payments to which this section applies which are due under such contract.

(b) Total unstated interest.—For purposes of this section, the term "total unstated interest" means, with respect to a contract for the sale or exchange of property, an amount equal to the excess of—

(1) the sum of the payments to which this section applies which are due under the contract, over

(2) the sum of the present values of such payments and the present values of any interest payments due under the contract.

For purposes of paragraph (2), the present value of a payment shall be determined, as of the date of the sale or exchange, by discounting such payment at the rate, and in the manner, provided in regulations prescribed by the Secretary or his delegate. Such regulations shall provide for discounting on the basis of 6-month brackets and shall provide that the present value of any interest payment due not more than 6 months after the date of the sale or exchange is an amount equal to 100 percent of such payment.

(c) Payments to which section applies.—

(1) In general.—Except as provided in subsection (f), this section shall apply to any payment on account of the sale or exchange of property which constitutes part or all of the sales price and which is due more than 6 months after the date of such sale or exchange under a contract—

(A) under which some or all of the payments are due more than one year after the date of such sale or exchange, and

(B) under which, using a rate provided by regulations prescribed by the Secretary or his delegate for purposes of this subparagraph, there is total unstated interest.

Any rate prescribed for determining whether there is total unstated interest for purposes of subparagraph (B) shall be at least one percentage point lower than the rate prescribed for purposes of subsection (b) (2).

(2) Treatment of evidence of indebtedness. for purposes of this section, an evidence of in-

debtedness of the purchaser given in consideration for the sale or exchange of property shall not be considered a payment, and any payment due under such evidence of indebtedness shall be treated as due under the contract for the sale or exchange.

(d) Payments that are indefinite as to time, liability, or amount.—In the case of a contract for the sale or exchange of property under which the liability for, or the amount or due date of, any portion of a payment cannot be determined at the time of the sale or exchange, this section shall be separately applied to such portion as if it (and any amount of interest attributable to such portion) were the only payments due under the contract; and such determinations of liability, amount, and due date shall be made at the time payment of such portion is made.

(e) Change in terms of contract.—If the liability for, or the amount or due date of, any payment (including interest) under a contract for the sale or exchange of property is changed, the "total unstated interest" under the contract shall be recomputed and allocated (with adjustment for prior interest (including unstated interest) payments) under regulations prescribed by the Secretary or his delegate.

Constitution of the State of California, Article XX, Section 22.

The rate of interest upon the loan or forbearance of any money, goods or things in action, or on account after demand or judgment rendered in any court of the State, shall be 7 percent per annum, but it shall be competent for the parties to any loan or forbear-

ance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent (Adopted 1934).

California Civil Code. Section 1916.2—Maximum Rate of Interest; Compound Interest; Effect of Contract Provisions for Excessive Interest.

No person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement, *interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed* by the party to be charged therewith. Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed. (Initiative Measure, Stats. 1919, p. lxxxiii, §2.)

1916.1—Usury Law—Section 1916, Civil Code, State of California.

Legal and Contract Interest Rates—The rate of interest upon the loan or forbearance of any money, good or things in action or on accounts after demand or judgments rendered in any court of this State, shall be seven dollars upon one hundred dollars for one year

and at that rate for a greater or less sum or for a longer or shorter time, but it shall be competent for parties to contract for the payment and receipt of a rate of interest not exceeding twelve dollars on the one hundred dollars for one year and not exceeding that rate for a greater or less sum or for a longer or shorter period of time, in which case such rate exceeding seven dollars on the one hundred dollars shall be expressed in writing. (Leg. H. 1919.)

Section 336—California Code of Civil Procedure.

Four Years—Contracts and Accounts—Within Four Years. An Action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in section 336a of this code, provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought, shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

(Note—336a referred to in above, refers to obligation on corporation bonds, notes and debentures.)

Statement of the Case.

This petition involves litigation that has been in the U.S. Court of Appeals (9th) and in the Tax Court of the United States for a period in excess of twenty years last past. It involves assessment of income tax liability involving six appeals to the U.S. Court of Appeals (9th), and seven opinions, and six petitions and opin-

ions in the Tax Court of the United States, and petition for certiorari to the U.S. Supreme Court. It involves a 68 year ground lease subordinated to a mortgage for construction financing which in 1955 the U.S. Court of Appeals held in 226 F. 2d 778 to be in fact an agreement of sale, and not a lease, and installment payments to be treated as capital gain. In determining how the lessor-sellor, and how the lessee-purchaser should be assessed respectively by the Internal Revenue Service, with reference to the monthly installment payments since the year 1929 has been the subject matter before the Courts, during the said twenty year period, half of which proceedings above referred to being initiated by the seller and half by the purchaser.

In 1929 lessor-seller entered into a 68 year lease covering vacant property on Wilshire Blvd., Beverly Hills, Calif. with predecessor of lessee-purchaser for the total sum of $680,000, payable in monthly installments over that period of time, the first ten years of which the monthly installments were $625 per month, a total of $7500 for the year and raised to $1000 a month, and $12,000 a year thereafter. The seller and the purchaser regarded the contract as a lease and reported the "rent" and paid on the income, taxes on the basis of ordinary income, on 100% of the income. In 1948, an agent of the Internal Revenue examined the records of the seller and advised the seller that since 1929 to 1947 he had been overpaying on income tax by reason of the purchaser getting a conveyance of the property for a nominal ten dollars at the end of the lease term, and that the transaction is actually a sale and should be reported as capital gain income, and from 1948 on has been paying on installment payments received as capital gain.

The purchaser on being advised of the agent's ruling, refused to abide by same, and continued reporting installment payments made as a rental deduction. This resulted in an assessment made by the Internal Revenue against both seller and purchaser, so that the Courts may determine the treatment of the said installment payments. Both seller and purchaser filed petitions for Review in the Tax Court of the United States with reference to the assessment by the Internal Revenue Service. Both proceedings were tried concurrently before the Tax Court, which held that the transaction was a lease and not a sale as advised by its Revenue agent. From this the lessor-seller appealed to the 9th Circuit Court of Appeals, and the purchaser-lessee followed with an appeal on his own behalf.

The Court of Appeals (9th) in 1955 in 226 F. 2d 798 held that the transaction was actually a sale and that all of the income was to be treated as capital gain by the seller and held in the appeal of the purchaser, in conformance therewith, which denied him the right to treat the installment payments as deduction for rent.

The purchaser being dissatisfied, moved the 9th circuit for a rehearing in which he contended that if the contract established a sale, he was entitled to an allowance on a portion of the installment payments as an allocation to interest. This motion for rehearing the Court denied. On denial of this motion by the 9th Circuit, the purchaser petitioned the U.S. Supreme Court for certiorari in 355 U.S. 815, stating similarly

as he did before the 9th Circuit that if the contract was actually a sale that he is entitled to a deduction in income tax treatment for an allowance of an interest factor. The petition before this Court was denied. Upon denial of said petition purchaser petitioned this Court for a rehearing on the petition which was also denied. (355 U.S. 879.) After denial of certiorari by this Court, the purchaser returned to and again petitioned the Court of Appeals (9th) stating that he had not previously presented the question of allowance of an interest factor and should therefore be heard, and the 9th Circuit granted his petition and ordered the Tax Court to take the interest factor into account and redetermine the tax liability accordingly and in pursuance thereof, the Tax Court ordered a recomputation of the tax liability, by which computation the rate of interest during the last year provided for in the contract of lease-sale, exceeded 800%. The Respondent herein (the Internal Revenue Service) appealed to the 9th Circuit and the said Court reversed the Tax Court and ordered new computations. These proceedings were all by purchaser, Wilshire, and the last decision of Wilshire became final in 1961.

From 1948 Walburga Oesterreich the lessor-seller, who later became Walburga Hedrick by marriage to Ray Bert Hedrick died in 1962, and Ray Bert Hedrick became her executor and successor to the lease-sale contract and is the petitioner herein. From 1948 on, the time when she was informed by Respondent's agent that the contract covered a sale the petitioner stopped

reporting and paying income tax on treatment of ordinary income and started reporting same on the basis of a sale. From 1955 when the 9th Circuit confirmed the agent's instructions to report same as a sale, as she had done since 1948, petitioner continued to report the income in said manner, said reporting and payment being accepted as correct by the Respondent until 1960.

Upon decision of *Wilshire* determining treatment of income tax based on reconsideration of Wilshire v. Commissioner of Internal Revenue in 1957, the 9th Circuit in 1958 revamped tax treatment from 1929 on, to include years adjudicated in 244 F. 2d 904, to include an interest element, the Respondent made a 1960 assessment against petitioner making computation on the precedent of the reconsidered *Wilshire* case and to conform to it and so retrieve the loss sustained by Respondent Commissioner, by the decision in the said later *Wilshire* case, which assessment against petitioner was with computations from 1929 on and which included the years to 1955 when *Oesterreich* case (petitioner's) became final. That at no time was the petitioner herein a party to any proceedings in the *Wilshire* cases. In the *Oesterreich* case, by leave of Court, Wilshire by its counsel appeared as *amicus curae*.

The Tax Court sustained the Respondent on the assessment for 1960 and petitioner appealed therefrom to the Court of Appeals (9th). The Court of Appeals reversed the Tax Court and remanded it with instructions for further consideration (406 F. 2d 587.)

The assumed principal of the $680,000 contract which Respondent reevaluated was set by him at $75,000 and the rate of interest fixed at 12% per annum compounded to conform to the computation in *Wilshire* reconsidered case. On reversal by the 9th Circuit, the Respondent reduced the interest rate to 8% compound interest, and so as to produce the same assumed earned interest the principal was increased to $118,682.98. The Tax Court again reduced the interest to seven percent compounded and to compensate for same so as to compute the same amount of interest, increased the assumed principal to $137,046.91. As a result of this the assumed earned but unpaid interest to be added to the principal on which unpaid assumed interest was added increased year by year so that by 1947, the $75,000 original assumed principal, changed to $157,204.40 on which a supposed to be unpaid and earned interest became the basis for the 1947 income tax computation. From this computation and assessment made thereon, the petitioner appealed to the 9th Circuit, which the Court says in its opinion is not subject to review because the previous decision (406 F. 2d 587) has become the law of the case.

REASONS FOR GRANTING THE WRIT.

I.

A Decision of a Court of Appeals Does Not Become the Law of the Case, so as to Bar Further Consideration of a Later Appeal in the Same Case After a Reversal When:

a. After remand to trial Court, the order of the Appellate Court is not specified in pursuance of the reversal, but general instruction is given, and appellant becomes dissatisfied with particular and specific order made by trial Court.

b. After remand on reversal, a complete new trial and hearing is had to determine how specifically the general instruction is to be applied.

c. On remand the trial Court does not comply with the tenor of appellate Court that appellant is entitled to more favorable treatment than given by trial Court in its previous decision.

d. On remand in its opinion, the appellate court in addition to the question on which trial court is reversed, in its order of reversal states that in addition to the question on which trial court is reversed, other questions raised but not passed upon in the reversal "have substantial merit."

e. Opinion on reversal and remand instructed the trial court that said trial Court is not required to follow as it did in the former hearing, the computations in a co-related case.

f. Instead of following the appellate Court's instruction on remand that it find a proper basis of interest suggesting the range of seven or eight percent, and seven percent simple interest is permitted by the

state law, but 7% compound interest is in violation of the State constitution, the Tax Court presumed that the appellate Court intended to violate the constitution and ordered 7% compound interest, instead of simple 7 percent which is permissive.

g. New issues are presented which were not present in the previous decision. In former appeal petitioner contended:

That 226 F. 2d 798 (*Oesterreich*) was *Res Adjudicata* for tax assessment for all future years, including 1960. In the last appeal, appellant agreed with respondent and Court that it was not necessarily adjudication for all future years after *Oesterreich* decision, but contended that it was *Res Adjudicata* for years thereafter until there was a change in legal climate, or circumstances, to wit *Wilshire* in 1961, and if not, then to 1955, the date of *Oesterreich* decision, or at least to 1947, covering all years up to the year in question in *Oesterreich*, during which years petitioner had paid full tax as ordinary income, and which *Oestrreich* decision held was all capital gain income. This contention in the latest case, the Tax Court rejected.

In view of the Tax Court hearing rejecting the plea of the Statute of Limitations being applicable to years from 1929 on to years prior to time of waiver (after 1947), on the last appeal in the Court of Appeals, the petitioner urged that if the Tax Court is correct in saying that the statute of Limitations is not applicable, then the petitioner should be granted by the Court of Appeals, the right to petition for overpayment of income tax for those very years prior to 1948 (*Oesterreich*) when he had paid income taxes on the income as ordinary income instead of on capital gain treat-

ment, and that would be inconsistent to hold that limitations does not apply for collection of tax, but does apply to demand for overpayment for same years. This is an entirely new feature in the latest appeal.

In the prior appeal, the computation was based on 12% computation of interest. The latest appeal, was based on 7% computation of interest. It would have been entirely irrelevant for petitioner to make contention against 7% compound interest computation when it was not in issue in the former appeal, if it could not be brought up in the second appeal, petitioner will be denied, the right to present one of the most contended questions in the entire appeal.[1]

---

[1]*Weller v. Valles County*—2 N.W. 2d 606—Holding that where remand is general the principle of "Law of the Case" does not apply. *Day v. Campbell*, 256 So. 2d 105, 260 La. 325—"The law of the case principle is applied merely as a discretionary guide. Argument is barred when there is merely a doubt as to the correctness of the former ruling not but in case of palpable error, or so as to accomplish manifest injustice. Further the "Law of the Case" principle is not applied so as to prevent a higher court from examining the correctness of the ruling of the previous court.

The *People v. Medina*, 6 Cal. 3d 484, 492 P. 2d 686 (Jan. 1972)—

> "The doctrine of the Law of the case which is merely a rule of procedure and does not go to the power of the Court has been recognized as being harsh, and will not be adhered to when the application will result in an unjust decision.
>
> *Transport Insurance Co. v. Employers Casualty*, 470 S.W. 2d 757.

"The doctrine (law of the case) does not apply when the issues presented at two different trials are not identical. This is especially true when on a second trial following a reversal and remand of the cause on appeal, the pleadings are amended by both parties. Under this situation, the doctrine is inapplicable." (Petitioners note.) Here both parties amended—The Government issued a new assessment notice, based on different assumed interest rate and different assumed principal, and petitioner was therefore required to and did file a new objection

II.

The Order of the Court of Appeals Making a Previous Decision the Law of the Case, Approves a Decision in Violation of the Constitution of the State of California, and of United States Law.

The computation on which assessment is based arbitrarily established a rate of interest of seven percent compounded. The California law is undisputable that the maximum interest permitted by the constitution is seven percent simple interest and that when same is compounded it becomes usurious. In matters of income tax law by the Internal Revenue Code, only simple interest can be charged on unpaid taxes. Without the compounding of assumed unearned and unpaid interest, no tax liability could exist under any computation.[2]

---

to assessment and made a different and new Petition for Review to the Tax Court.

Illinois Central RR Co. v. Saetz, 73 N.E. 585.

"When a submitted proposition as 'The Law of the Law of the Case' was a mixed proposition of Law and Fact, the principle is properly refused.

Commissioner of Internal Revenue v. Netcher, 143 F. 2d 484.

"The doctrine of the Law of the Case permits a change of decision where among other things, intervening between first and second appeal, there has been a material change as to the facts or in the applicable law.

Cochran v. UM&M Transit Co., 110 F. 2d 519.

"The Law of the Case doctrine must not be utilized to accomplish injustice."

[2]Constitution of the State of California, Art. XX, Sec. 22, California Civil Code of the State of California, Sec. 1916.1, 1916.2. There never has been any question but that compounding interest at seven percent is in violation of the Constitution of the State, and the Civil Code. The latest case confirming same is *Estate of Sharp* (1971) 18 Cal. App. 3d 565, 95 Cal. Rptr. 816. The Court here said "We reject any procedure by which unpaid accrued interest would itself bear interest".

(This footnote is continued on next page)

III.

By Permitting the Former Decision to Become Law of the Case, the Court of Appeals Approves a Violation of Constitutional Provision for Due Process, and for Validity of Ex Post Facto and Retroactive Application of Later Law.

The first possible "change in legal climate" from United States law and from *Oesterreich v. Commissioner*, 266 F. 2d 798 (the former decision affecting this petitioner's tax liability), was *Commissioner v. Wilshire*, 288 F. 2d 799 (co-related case), which became final in 1961. The assessment here is for 1960, which reevaluated tax treatment for years from the beginning of the contract, 1929, to 1960. In 1964 by Sec. 483 of the Internal Revenue Code, it was permitted to compute interest not in excess of five percent in contracts which should bear interest but where the contract was silent. In the instant case, the 1960 assessment was based on assumed accumulation of assumed interest at seven percent compounded since 1929, upon which

---

In *State of Calif. v. Day*, 76 Cal. App. 2d 536 at page 554, the Court said:

> "It should also be noted that the legislature has expressly provided that in the computation of interest upon any bond note, or other instrument or agreement, interest shall not be compounded nor shall interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith. Innumerable more cases can be cited to which there is no divergence in opinion to the effect that unless agreed to in writing signed by the parties to be charged, under California law seven percent interest compounded is in violation of the California constitution and statutes."

The interest rate in Sec. 483 I.R.C. is 5%. Under USCA Title 26, Section 6601, is set out the interest rate permitted on underpayments and overpayments as 6% in subsection (a). Under subsection (f), we find "No interest on interest—no interest under this section shall be imposed on the interest provided by this section.

the deficiencies claimed since 1947 was made the basis for the assessment in 1960. Without application retroactively from 1929 to 1960 by respondent's computation, and by that means and assuming the fiction of unpaid earned income so as to start in 1947 with a deficiency, up to which date tax on 100% of income as ordinary income was paid, no deficiency could be established. Two factors had to be created, a compounding of interest on supposed-to-be income and retroaction on computation of 1960 income, to 1929. The actuary for the respondent testified that he was instructed as to the result desired and to devise a computation to obtain it and that it was the first time in his experience that he used or had to employ such a method. This in the first Tax Court hearing.[3] In the second Tax Court proceeding another government actuary testified,[4] he was handed instructions with the computation to employ which brought about the desired result.[5]

---

[3]Mr. Williams testimony, Rep. Tr. pp. 45 to 79.

[4]Mr. Harvey H. Hyard's testimony, Rep. Tr. pp. 15 to 73.

[5]The denial of due process by retroactive application of a law to a later situation particularly applying to a case involving the new practice after enactment of Sec. 483, to establish an interest factor in contracts of similar nature as here is clearly stated in the latest case of *Shanahan v. United States*, 447 F. 2d 1082. Here the Court upheld the retroactive application because section 483 specifically provided for the accounting to go back to the beginning of the year that the statute was enacted so as to take in a complete accounting year, and the Court upheld the retroactive application saying that the exception made was a reasonable one to accommodate accounting procedures, while the new statute was being enacted. That provision was held by the Court as reasonable and not a violation of due process or constitutional provision. In the instant case the retroaction was for more than thirty years, (1929) to *Wilshire* case, final in 1961, and thirty-five years prior to enactment of Section 483.

(This footnote is continued on next page)

IV.

By Permitting 405 F. 2d 587 to Become the Law of the Case Violates the Integrity of the Decisions of the Courts of the United States in That It Disregards the Principle of Due Process and Res Judicata.

In 1955 the U.S. Court of Appeals rendered opinion in *Oesterreich v. Commissioner*, 226 F. 2d 798, covering tax computation for years from date of the contract, 1929, to 1947. In 1972 United States Court of Appeals approved computation by Commissioner on which income tax was based covering the same years on which taxes had in years past been paid and accepted in accordance with said 226 F. 2d 798 (1929 to 1947), and determined that notwithstanding and contrary to the previous decision in 1955 which covered manner of computation for those years, 1929 to 1948, and on which full taxes on ordinary income had been held the new computation for 1960 may reevaluate, treat differently and include the years 1929 to 1948 on which the liability for taxes and deficiency is to be assessed in 1960. It totally disregards the principle of *Res Judicata,* at least as to the years cov-

---

United States v. Portland Cement, 413 F. 2d 161 reviews the regulation which resulted in Sec. 483, and the same provision for retroactive application, similarly holding that it comes within the specific exception provided for in the statute. The opnion in this instance comes from the same circuit as the instant case (9th), but its decision in the instant case does not conform to it.

Robinson v. Commissioner of Internal Revenue, 432 F. 2d 767, is to the same effect. All these cases hold that unless the act specifically provides for the limited retroactive application, and the period of time allowed is reasonable, the retroactive provision or application is void.

Additional authorities on non permissive application retroactively of later laws and decisions to former years. *Commissioner v. Goodwin Crocker,* 315 F. 2d 110, *Broadcasting v. Dist. of Columbia,* 313 F. 2d 554, Helvering, *Commissioner v. Cronin,* 106 F. 2d 907, *Morey v. Ridell,* 205 F. Supp. 918.

ered by *Oesterreich*, 226 F. 2d 798 and denies the validity of its own judgment on the same subject matter.[6]

V.

The Former Decision of the United States Court of Appeals Becoming the Law of the Case Approves a Violation of Established Law, Resulting in Unusual and Unrealistic Presumptions and Incurs a Great Injustice by Assuming Proration of Principal and Interest and Rate of Interest in Income Tax Computation Where None Is Stated in the Contract in Question so That the Interest Based on the Usurious Interest Rate Assumed Results in Amounts of Interest Greater Than the Installment Payments Provided for in the Contract, and Is in Excess of a Rate Later Provided for in a Later Enacted Internal Revenue Code Provision.

The previous decision of the United States Court of Appeals disapproved a rate of interest of twelve percent per anum to conform to allowance to Wilshire on unpaid assumed principal established in computation by the Commissioner, this being the decision that the Court of Appeals reversed the Tax Court on, and remanded for establishment of a lower rate of interest, and being the decision that the Court of Appeals now states to be the Law of the Case. The Commissioner on remand reduced the interest rate to eight percent compound interest and the Tax Court reduced it to seven percent compound interest, on assumed indebtedness, which was not actually and never received by this taxpayer which reduction did not reduce tax liability as principal was raised to produce same result as

---

[6]Authorities last cited under Point III *supra* are also applicable here.

12%. The contract in question provides for installments payments for the first ten years of $7500 per year. The amount of yearly interest by the assumed rate of interest results in $9000 yearly interest. As the additional $1500 was never received by taxpayer and taxes were paid in full on the $7500 actually received, and indebtedness owing to taxpayer in the sum of $1500 per year was assumed as if acutally paid to him and seven percent interest added to the assumed portion of principal, so that the following year in addition to computation on original assumed principal, computation was made for earned interest on the original principal plus $1500, and so the amount of interest increased each year which became a basis for tax computation as if it had actually been received, so that by 1948 an indebtedness (which never actually existed and which was never received as such) became grossly inflated from the original assumed principal and earned interest, and made a basis for income tax assessment.[7]

VI.

The Rule of the Law of the Case Approves a Computation for Income Tax Assessment Based on a Presumed Indebtedness That Is Barred by the Statute of Limitations Assuming That Such Indebtedness Actually Existed, Which It Did Not.

The Statute of Limitations on contract in California is four years. The limitations for recovery of unpaid income taxes is three years. The computation for assess-

---

[7]The computations above referred to are available and will be presented if desired by the Court.

Also in Tax Coordinator, page 16, Sec. U 1101 Note No. 2:

"A change in the law or legal climate after final judgment on a particular years tax will not avoid the bar of Res Judicata in any attempt by the taxpayer or his transferees to relitigate the same years—Estate of Eagen 28 TC 988."

ment in 1960, goes back to an assumed indebtedness since 1929 from which time the contract provided that installment payments for the first ten years are $625 per month, $7500 per year. By reason of the fiction of indebtedness by Wilshire to petitioner because the agreed installment payments of $7500 per year being insufficient to pay the arbitrarily set interest on the principal, respondent made computation so that the lessee-purchaser (Wilshire) owed to the petitioner $1500 which became subject to income tax to be paid by petitioner, the same was added to the totally unpaid principal.[8]

VII.

This Petition Should Be Granted and the Decision of the Court of Appeals Reviewed so That Conformity May Exist in the Decisions With Other Cases in the Same Circuit, in Other Circuits, and With the Supreme Court of the United States, and With Constitutional and Statutory Provisions of the United States, and Interpretation by the Various States of Its Own Constitution and Statutes.

The non-conformity of the decision here to prevailing law has been indicated under the other points herein set out,

(1) the non-conformity of the three opinions in the *Wilshire* cases, with each other and with the opinions in this taxpayer's cases (*Oesterreich-Hedrick*) and said cases with each other, all in the same circuit.

---

[8]Sec. 336—California Code of Civil Procedure. It is also, of course necessary to assume that the balances claimed by the computation were actually owing, which they were not, and never so regarded by seller or purchaser.

(2) On the matter of the Law of the Case with cited authorities.

(3) On the matter of affirming a Tax Court holding on the matter of usury contrary to the provision in the constitution of the State of California, its Civil Code, and cases.

(4) Permitting a supposed to be indebtedness computed since 1929, is in conflict with the California statute of limitations, and assessment for Tax thereon, in violation of Internal Revenue Code, limiting same to three years.

(5) Permitting a readjudication in 1972 of years on which income taxes had been paid over the years and adjudicated in 1955.

(6) Retroactive application to 1929 and from then on, to conform to a decision (*Wilshire*) which became final in 1961.

(7) Accepting a case (*Wilshire*) as a precedent and basis for conformity, which resulted from a misrepresentation of the record to the Court, and which case has not favorably been referred to since that time (1961).

(8) Permitting assumed unpaid income tax to bear interest on unpaid interest contrary to Internal Revenue Code and California Constitution.

VIII.

The Co-Related Case, Commissioner v. Wilshire, 288 F. 2d 799, Which Is the Result of a Misrepresentation of the Record in the Case to the Court of Appeals, After Denial of Petition for Certiorari by This Court, Which Is the Sole Basis for Readjudication of Petitioner's Income Tax Treatment as Being a Change of "Legal Climate" From Oesterreich v. Commissioner, 226 F. 2d 798, and Which Has Not Been Favorably Cited in Any Later Case in the Manner of Computation of Income Tax, Should Not Be the Precedent and Law of the Case in This Instance Where the Court of Appeals Has Accepted That Case as the Precedent for the Case at Issue Here.

It had previously here been pointed out that income tax treatment of petitioner's taxes was adjudicated in 1955 covering years 1929 to 1948, in *Oesterreich v. Commissioner*, 226 F. 2d 798, by which the Court held all income to be subject to capital gain treatment, and for the lessee-purchaser in *Commissioner v. Wilshire*, 244 F. 2d 904. *Commissioner v. Wilshire*, 288 F. 2d 799, several years after said *Wilshire*, 244 F. 2d 904, not only reversed the manner of treatment of installment payments from said later date on but included reversal of treatment of income from 1929 on, which had been previously determined and this became the precedent and cause of conformity of petitioner's income tax treatment, notwithstanding that petitioner was never a party to or participated in the *Wilshire* case and petitioner's tax liability had been adjudicated at least to 1947.

The record is very clear that after *Wilshire*, 244 F. 2d 904, that it moved for rehearing on the ground that an element of interest should be allowed, which motion was denied, and that petition for certiorari to the U.S. Supreme Court based on the same contention that an element of interest should be allowed and the petition was denied, and that thereafter Wilshire again petitioned the U.S. Court of Appeals on the same grounds stating that the question of allowance of interest is a new matter which it had not previously presented which was untrue. To accept a decision based on such misrepresentation as the law and precedent for this petitioner's income tax treatment should not have the approval of the court and is an injustice to petitioner. Prior to *Wilshire*, 288 F. 2d 799, no provision existed in law for an element of interest to be included in realty transaction where the contract did not provide for interest. Excepting the *Wilshire* case, the first change in this respect was in 1964, by enactment of Sec. 483 of Internal Revenue Code.

IX.

If This Petition Is Not Granted Multiplicity of Suits and Extended Litigation Will Ensue.

While the present litigation was pending, the Commissioner filed a new assessment claiming deficiency for the years 1966, 1967 and 1968. And on Petition for Review, the said matter is now in the Tax Court under Docket No. 362370. In the said proceeding, the petitioner has additional defenses to those in question here, and a termination of the litigation by denial of this petition will not therefore control the said new Tax assessment for those years. If on a granting on this petition and a hearing on the merits, is granted.

and the position of petitioner is found to be meritorious, it should dispose of the said new Tax Court matter, and control for future years.[9]

X.

The Petitioner Had Conformed to the Mandate in Supplying the Tax Court With a Computation Based on the Suggestion by the Court of Appeals and in Conformity to the Method of Computation Suggested by the Court.

The Court of Appeals in its prior decision suggested an assumption of seven or eight percent interest and that a possibly higher principal could be used. The petitioner, then submitted to the Tax Court in the instant case, under Tax Court Rule 50, two schedules, both using the highest legal rate of interest, to wit seven percent, and an assumed principal of $75,000, up to then accepted by the Appellate Court, the Tax Court, the respondent, and Wilshire. In order to further comply with the Court's suggestion that the computation could possibly stand a higher assumed principal, petitioner prepared a second schedule which absorbed all of the installment payments for the first ten years as interest, to wit $7500 per year. These schedules were prepared by certified public accountants of national reputation, S. D. Leidesdorf and Company, and are Exhibits 18 and 19, submitted herewith in the appendix.[10] These were rejected for the reason that they did not show an unpaid balance each year

---

[9]By stipulation, hearing in the Tax Court is abated pending the determination in the instant matter. The said assessment and petition for review in the Tax Court has issues other than those here, in addition to the present case, and on denial of this petition, extended litigation is anticipated.

[10]Appendix pp. 28-38.

on which interest could be assumed as owing and said supposed to be unpaid interest added on and compounded from year to year, so as to result in the same tax liability as originally in the computation made by respondent in the previous case (Court of Appeals Docket No. 20005).

In its Memorandum Opinion in the present case, the Court comments that the parties should make an effort to compose their differences. In the Reporter's Transcript, appears in the Addenda, copies of letters written by this counsel to the counsel for respondent, and testimony of telephone calls to Washington, to none of which was this counsel favored with a reply or an indication of willingness to enter into any discussion.

It will be noted that in the two computations, Exhibits, 18 and 19, that petitioner uses the same method of computation as respondent, and that notwithstanding petitioner's contention of it being retroactive, commences computation from 1929 on, though full ordinary income tax had been paid until 1948. Though such retroactive application may seem inconsistent with petitioner's position, and though petitioner could have petitioned this Court for certiorari at that time, petitioner relied on the favorable comments of the Court of Appeals and the apparent desire that the Tax Court take into account the other points raised by petitioner which in the language of the Court of Appeals "Have substantial merit." It was the desire of this petitioner to conform and comply with the Court's mandate and thereby help to dispose of the

litigation. We guessed wrongly. The commissioner and the Tax Court did not go along with the mandate of the Court of Appeals.

Conclusion.

After twenty years of litigation with six appeals to the United States Court of Appeals divided between two co-related taxpayers, where the opinions are inconsistent with each other and the opinions of other Federal and State Courts, and in violation of the constitution of the State of California on the matter of usury, where due process was not observed in treatment of co-related litigants involving the same income where the major portion of all the litigation is the result of a misrepresentation by one of the litigants as to the record in the case at issue and the Court relying on said misrepresentation as true, allowed said litigants unusual and favorable treatment, as a result of which to compensate for same, the petitioner was reassessed for years that had been adjudicated many years prior thereto, resulting in a liability for years on which income taxes had been paid in full and so acknowledged by the respondent.

It is indeed an anomaly that the same Court in a co-related case involving the same subject matter, upon which the present case is predicated, would permit the co-related litigant after adjudicating on the merits (*Wilshire v. Commissioner*, 244 F. 2d 904) and after denying a motion for a new trial, and after the United States Supreme Court denied certiorari, and then

denied a petition for rehearing, to then return to the Court of Appeals which first adjudicated the case, present the issue on which said Court and the U.S. Supreme Court had refused reconsideration, and obtain a new different and reversed opinion, and in the present instance, on a new appeal after a reversal, trial Court's new finding and decision, new pleadings, new trial and new issues, refuse to hear the new appeal because of the "Law of the case," enunciated in the case which had been reversed.

Respectfully submitted,

CHARLES I. ROSIN,
Attorney for Petitioner.

APPENDIX A.

APPENDIX A.

United States Court of Appeals, for the Ninth Circuit.

Estate of Walburga Hedrick, deceased, aka Walburga Oesterreich, Ray Bert Hedrick, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 26,292.

Filed: April 14, 1972.

On Petition to Review a Decision of the Tax Court of the United States.

Before: CHAMBERS and JERTBERG, Circuit Judges, and CROCKER, District Judge.

Per curiam:

The decision of the Tax Court, pursuant to our Estate of Hedrick v. Commissioner, 406 F.2d 587 (9th Cir., 1969), is affirmed.

On remand, the Tax Court, in reconstructing the transaction, adopted as to the Hedrick Estate a rate of 7%. This resulted in establishing an original sale value, as reconstructed, of an amount about twice the actual case value of the property at the time of sale.

We find the decision complies with out mandate. The present objections of the Hedrick Estate are primarily directed at our prior opinion, which has become the law of the case.*

---

*Earlier decisions concerned with the same transaction are Oesterreich v. Commissioner, 226 F.2d 798 (9th Cir. 1955), Commissioner v. Wilshire Holding Corp., 288 F.2d 799 (9th Cir. 1961), and Hedrick v. Commissioner, 406 F.2d 587 (9th Cir. 1969).

APPENDIX B.

Memorandum Order.

United States Court of Appeals, for the Ninth Circuit.

Estate of Walburga Hedrick, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 20,005.

Filed: July 3, 1967.

Petition to Review a Decision of the Tax Court of the United States.

Before: CHAMBERS and JERTBERG, Circuit Judges, and CROCKER, District Judge.

As a consequence of the reviews and remands in the Wilshire Holding Company cases,* Wilshire, "lessee," has obtained the advantage of deductions of compound interest at 12% per annum on its federal income taxes.

Is it not true that if the so-called lease at the root of the Wilshire Holding and the Oesterreich cases had been entered into after the effective date of Int. Rev. Code of 1954 § 483 (1964), and Int. Rev. Reg. 19,3-1 (1964) (or, perhaps, if the lease had not been in tax litigation until after the adoption of the new rules), Wilshire would have had a deduction of interest of 4% and the "lessor" interest income at the same rate, with the balance of payments allotted to principal?

The court asks this further question: Does it comport with due process or equal protection of the laws for the Commissioner of Internal Revenue to assign

---

**Oesterreich v. Commissioner*, 9 Cir., 226 F.2d 98; *Commissioner v. Wilshire Holding Corp.*, 9 Cir., 244 F.2d 904, cert. denied, 355 U.S. 815; *Wilshire Holding Corp. v. Commissioner*, 9 Cir., 262 F.2d 51; *Commissioner v. Wilshire Holding Corp.*, 9 Cir., 288 F.2d 799.

other "lessors" (who have their "leases" recast) interest at a rate of 4% with the balance assigned to principal) and to assess an interest rate of 12% compounded to the petitioner?

Stated another way, shouldn't the government absorb the loss between Wilshire's deduction and the current rate?

All through the litigation, the court has been handicapped by the all or nothing attitude of both parties, the court believing justice was somewhere in between the poles. Petitioner should keep in mind that by the literal terms of the "lease" substantially all payments qualified as income.

If the parties will address themselves on an arguendo basis to the questions suggested above, the court will not consider such discussions a waiver of the parties' basic positions.

The Commissioner is requested to respond within 30 days and the petitioner within 30 days thereafter.

The case is withdrawn from submission. Unless otherwise ordered, it will be deemed resubmitted on September 15, 1967.

Estate of Walburga Hedrick, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 20,005.

Memorandum to Clerk Luck:

All judges concerned having concurred in the within opinion or order, the clerk will please file.

/s/ Richard H. Chambers
Judge

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Estate of Walburga Hedrick, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 20,005.

[January 6, 1969].

On Petition for Review of the Decision of the Tax Court of the United States.

Before: CHAMBERS and JERTBERG, Circuit Judges, and CROCKER, District Judge.

CHAMBERS, Circuit Judge:

This tax case has its roots in a lease made by Walburga Oesterreich, later Walburga Hedrick, with Wilshire Amusement Corporation, predecessor of Wilshire Holding Corporation. The lease was for 68 years and dated September 11, 1929. At the end of the term, there was an option to acquire the property for a ten dollar payment.

A prerequisite for the reading of this opinion is a familiarity with the prior opinions on this same lease:

Commissioner v. Wilshire Holding Corp., 244 F.2d 904;

Commissioner v. Wilshire Holding Corp., 262 F.2d 51;

Commissioner v. Wilshire Holding Corp., 288 F.2d 799;

Oesterreich v. Commissioner, 226 F.2d 798.

Early we held that the commissioner could recast the transaction into a sale and later we held that an

appropriate interest rate should be considered. On the third remand to the tax court, we ordered that Wilshire could compute the interest rate for a deduction at 12% per annum. Now the Hedrick estate petitions us for relief when it is charged in the tax court in its separate proceeding with receiving 12% interest, or thereabouts.[1]

The taxpayer says collateral estoppel applies and it should be charged with no interest income because of our first Oesterreich decision, supra. We reject the contention.

The first Oesterreich case held that Walburga Oesterreich was entitled to treat the payments from Wilshire as long term capital gain; Wilshire was precluded from deducting its payments as rent. Subsequent decisions by this court followed the first Oesterreich case and recognized that payments under a rental agreement which had been recast by the commissioner into an agreement for sale could involve some deductible interest. Robinson v. Elliott, 262 F.2d 383; Starr's Estate v. Commissioner, 274 F.2d 294. Wilshire No. 2, 262 F.2d 51, allowed interest to Wilshire. This changed the legal climate. At this stage, the estate of Mrs. Hedrick (formerly Mrs. Oesterreich) cannot rely on collateral estoppel to completely escape liability for interest payments received from Wilshire. Commissioner v. Sunnen, 333 U.S. 591.[2]

Why did we use the 12% rate for Wilshire in Wilshire No. 3? Wilshire No. 2 suggested a division of the

---

[1]Many years since 1945 are at issue here because the taxpayer has been signing waivers on the statute of limitations.

[2]The discourse of the Tax Court on this issue adequately covers the subject and we agree. 23 TCM 1374, TC Memo. 1964-228.

monthly rate between principal and interest. On remand, a former commissioner declined to submit any computation dividing the payments between principal and interest. Thus, on Wilshire No. 3 we held in effect, in view of the commissioner's failure to submit a division between principal and interest, that Wilshire as taxpayer should have for a deduction the favorable rate of 12% per annum, the highest lawful rate in California in 1929. We said that if a going rate had been found for 1929, we probably would have upheld it.

Here in Oesterreich (now Hedrick's estate) No. 2, we must admit that the points on which the executor chose to defend have substantial merit. And, they were not really covered or concluded in principle by any holding in the Wilshire cases. Thus, we feel we cannot fault the estate for not presenting evidence or computations at the second Oesterreich tax court trial on a division between principal and interest.

As to the Hedrick estate, we hold the division should assume a much higher value than $75,000, the top cash value at the time of the sale. People do not sell property at the same price on long contracts where, as here, there is little assurance of long term responsibility of the purchaser and of course the interest rate is usually higher than the legal rate (meaning the rate charged in absence of contract). The tax court may find something in the range of 7%[3] or 8% reasonable here.

The first Oesterreich and Wilshire holdings introduced or discovered new principles in tax law. Thus,

---

[3]We do note that the original lease provided for 7% on delinquencies, but that should not be necessarily determinative on the 68 year term.

the final sifting of the details was apt to be a little coarse.

Congress has taken ahold of the problem, confirming in principle our earlier Starr and Oesterreich and Wilshire Holding decisions. This it has done in passing Section 483, 26 U.S.C.[4] effective after December 31, 1963. In the future, there should be no reason for inconsistent results.

We commend counsel for the government for trying to prevent the end result achieved here, and we should note that the excoriations (by counsel for petitioner) of the commissioner are hardly fair.

We think our holding is in line with a concession made here by the commissioner in a supplemental brief as follows:

> "Of course, the Court may determine what is the proper rate for the 'lease' independent of the Wilshire Litigation. Taxpayer was not a party to the proceeding in which the twelve per cent rate was set for Wilshire and, while the Commission is concerned that the revenue not be whipsawed by inconsistent determinations, there is, so far as we know, no principle of Law which would preclude the Court from determining the proper rate for this case. The Government would have to absorb the difference between the twelve per cent rate and any lower rate determined by the Court. * * * *"

On Oesterreich No. 3, which we hope will never be, there will be time to decide if the estate should be charged with 12% income because it refuses (if it does) to submit anything else.

The decision of the Tax Court is reversed for proceedings consistent with this opinion.

---

[4]Sec. 224(d), PL 88-272.

APPENDIX D.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Walburga Oesterreich, *Petitioner*, vs. Commissioner of Internal Revenue, *Respondent*. No. 13,924, Oct. 29, 1955.

Petition to Review a Decision of The Tax Court of the United States.

Before: FEE and CHAMBERS, Circuit Judges, and LING, District Judge.

This case is here on petition to review a decision of the Tax Court relating to a deficiency assessment. The following facts are not in dispute.

Petitioner, Walburga Oesterreich, acquired three adjoining lots, 552, 553 and 554, in January, 1926. One of the lots was on the corner of Wilshire Boulevard and Hamilton Drive in Beverly Hills, California.

Wilshire Amusement Corporation was incorporated in 1929 by Albert H. and Albert J. Chotiner, father and son, for the purpose of building a motion picture theatre. They directed a real estate broker, operating in Beverly Hills, to find a suitable location which they could lease and on which they could construct a theatre. The broker learned from Walburga that she would be willing to enter into a lease for the three vacant lots which she owned and he arranged a meeting between the Chotiners and Walburga. After negotiations, Walburg and Wilshire Amusement Corporation entered into an agreement entitled "lease" dated September 11, 1929. The Chotiners decided, in the course of the negotiations, that additional land would be needed for

the theatre which they desired to build and for that reason Wilshire Amusement Corporation purchased lot 555 and the northerly 40 feet of lot 556 at a total cost to it of $19,650. Wilshire conveyed that land to Walburga in the fall of 1929.

Walburga is referred to as lessor and Wilshire Amusement Corporation is referred to as lessee throughout the agreement of September 11, 1929. The "lease" agreement provides for payments called rent to be paid by lessee, Wilshire Amusement Corporation to lessor, the taxpayer. The lessee agreed to pay the lessor total rent of $679,380 payable in monthly installments for a period of 67 years and eight months beginning September 1, 1929 and ending the last day of April, 1997. The rental schedule provided for an annual rental of $7,500 for the first 10 years, $12,000 for the succeeding 18 years and amounts becoming progressively smaller so that the rental for the 68th year was $7,500. The lessee agreed to pay all taxes and similar charges on the property. The lessee agreed to erect a new building on the premises to cost not less than $300,000 and to be completed not later than July 1, 1930. The lessor agreed to join in the execution of notes or debentures and in a deed of trust or mortgage covering the leased premises to secure a loan not to exceed $225,000 to be used in constructing the building. The lessee agreed to take out adequate fire insurance on the building and insurance to protect lessor from claims arising out of the use of the premises. The agreement states that the lessee proposes to sublease a portion of the building for theatre purposes. The lease could be assigned by the lessee upon the terms stated therein and such an assignment would release the lessee of further obligations under the lease. The lessor could declare the lease

terminated in case of default continuing longer than a period stated in the lease. The lessee had the right, but was not bound, to tear down any building which might be built on the premises for the purpose of reconstruction in accordance with the terms of the lease should the original building become obsolete or not suited to the purpose of the lessee. Any such replacement was to cost not less than $325,000.

One paragraph of the lease provided that when the lease expired and all conditions met, the

> "lessor promises and agrees that she will then, upon the payment to her of the further sum of ten dollars ($10.00) in hand, convey or cause to be conveyed by grant deed to the Lessee free and clear of all encumbrance, all of the real property herein leased, without further or other consideration."

The agreement was recorded in the Official Records of Los Angeles County.

Wilshire Amusement Corporation changed its name to Wilshire-Hamilton Properties, Inc., shortly after September 11, 1929. Wilshire Holding Corporation succeeded to the interest of Hamilton under the agreement of September 11, 1929, in August, 1935.

Wilshire Holding Corporation paid the taxpayer $12,000 in each of the years 1945 and 1946 in accordance with the agreement and entered the amounts so received as rental expense. The taxpayer, on her returns for 1945 and 1946, reported the $12,000 as income from rents. She received a letter from an Internal Revenue Agent in Charge indicating over assessments in her income tax for 1945 and 1946, and enclosing a report in which it was stated that she had

reported rental income of $12,000 for the years 1945 and 1946, but investigation showed that the agreement under which these payments were made was "not a lease, but in effect an installment sale of realty under Section 44(b) of the Internal Revenue Code," and she overstated her income for each year by $6,206.91 in that connection. She received another letter from the same source dated July 26, 1949, reversing the previous conclusion and stating that the rents were correctly reported as income on her previous tax returns.

The Commissioner determined a deficiency in income tax of $141.16 for 1946 against Walburga Oesterreich and deficiencies against Wilshire Holding Corporation of $1,584 in declared value excess profits tax, $3,097.83 in excess profits tax, for 1945, and $2,798.20 in income tax for 1946.

The Tax Court entered its decision sustaining the Commissioner's determination of deficiency in the taxpayer's income tax for the year 1946.

There is only one issue presented by this case. Is petitioner entitled to treat "rental" payments made by "lessee" as long term capital gains or must she treat them as ordinary income? Conversely, is lessee, the Wilshire Holding Corp., entitled to treat these payments as a deductible business expense as defined by Int. Rev. Code Sec. 23(a)(1)(A), or merely as non-deductible capital expenditures? The sole issue, therefore, is whether the agreement is a lease or a contract for the sale of land. The courts, in making determinations of this sort, commonly consider the intent of the parties and the legal effect of the instrument as written.

It seems well settled that calling such a transaction a "lease" does not make it such, if in fact it is something

else. *Judson Mills*, 11 T.C. 25 (1948); *Robert A. Taft*, 27 B.T.A. 808 (1938). To determine just what it is the courts will look to see what the parties intended it to be. *Benton v. Commissioner*, 197 F.2d 745 (5th Cir. 1952). Both petitioner and Wilshire Holding Corp. have at all times referred to the agreement as a lease and they have treated the payments as rental income and rental expense respectively. For this reason, perhaps, the Tax Court assumed that the parties intended a lease. However, the test should not be what the parties call the transaction nor even what they may mistakenly believe to be the name of such transaction. What the parties believe the legal effect of such a transaction to be should be the criterion. If the parties enter into a transaction which they honestly believe to be a lease but which in actuality has all the elements of a contract of sale, it is a contract of sale and not a lease no matter what they call it nor how they treat it on their books. We must look, therefore, to the intent of the parties in terms of what they intended to happen.

It is clear that it was intended that title to the premises was to pass to lessee at the end of the 68 year term. The testimony of the parties makes this explicit. Therefore, if the only test in determining whether it was a sale or lease was the passing of title, the parties intended a sale and not lease.

Testimony was offered to the effect that petitioner wanted the bulk of the consideration for the "lease" as soon as possible so that she could enjoy the money during her lifetime. Consequently, the agreement which provided for a tapering off of the rental payments in the later years was tailored to suit her needs and to what the lessees could afford to pay. This was

the intent of the parties and this is what went into the agreement. Here we see that what the parties intended and the legal effect of the transaction were one and the same, so we should not consider the intent of the parties apart from the legal effect of the agreement.

The question before us remains whether petitioner is entitled to treat her rental payments as long term capital gains rather than rental income and conversely whether Wilshire Holding Corporation is entitled to deduct the payment as rental expense as defined by Sec. 23(a)(1)(A) which provides as follows:

> "In computing net income there shall be allowed as deductions:
>
> (a) Expenses.—
>
> (1) Trade or Business Expenses.—
>
> (A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken *or is not taking title or in which he has no equity*." (emphasis supplied)

If Wilshire Holding Corporation is either taking title to the property or has acquired an equity, it cannot treat the payments from Wilshire as rental income. It is important to note that these two provisions of Sec. 23(a)(1)(A) are stated in the alternative and the deduction cannot be availed of if Wilshire Holding Corporation has brought itself into either category prohibited by statute. *DuPont v. Deputy*, 22 F. Supp.

589, 599 (D.C. Dela. 1938), *modified on other grounds*, 103 F.2d 257 (3d Cir. 1939), *cert. granted*, 308 U.S. 533 (1939), rev'd on other grounds, 308 U.S. 488 (1940). In *Helser Machine & Marine Works*, 39 B.T.A. 644, 645, 646 (1939) the court stated,

> It is not necessary to hold that by payment of the rental petitioner acquires an "equity", for that word is not easy to define; it is enough that the lease provides a right in the petitioners to take title to the premises for which the rental was paid.

This language was cited with approval in *Judson Mills*, 11 T.C. 25 at 33 (1948). See also *In re Rainey*, 31 F.2d 197 (D.C. Mary. 1927) (non-tax). We find, therefore, that the Tax Court was in error for it ignored this alternative ground of taking title and based its decision on the ground that it believed Wilshire Holding Corporation had not yet acquired an equity in the premises.

There can be no doubt that Wilshire Holding Corporation is acquiring title to the premises. At the expiration of the lease it can acquire the premises now worth $100,000 for the token consideration of $10. Although there have been cases holding that a mere option to buy at the expiration of the time period does not turn a lease into a contract of sale, *Benton v. Commissioner*, supra, 197 F.2d 745; *Indian Creek Coal & Coke Co.*, 23 B.T.A. 950 (1931); *Haverstock*, 13 B.T.A. 837 (1928), it should be noted that in all of these cases, the option price constituted full consideration for the premises or goods acquired. In each

of these cases it was always questionable whether or not the options would be exercised. Here there is virtually no question of this, for not only will Wilshire Holding Corporation acquire valuable land for a mere $10 but it will forfeit a $350,000 building now on the premises to the lessor if it does not decide to pay the $10 and take title. The testimony clearly shows that the Wilshire Holding Corporation during all of the original negotiations was very much concerned with what would happen to its building and the land after the lease expired and would not have agreed to the "lease" unless it provided that title would vest in Wilshire.

Another factor leading to the conclusion that the parties at the time of the transaction intended a sale is that the schedule of payments under the so-called lease was not commensurate to the benefit derived by Wilshire from the occupancy and use of the land, for instead of rising toward the end of the lease as the land on Wilshire Boulevard became more valuable the payments decreased.

The alternative criterion under Sec. 23(a)(1)(A) which would prevent Wilshire Holding Corporation from treating the payments as a business expense is whether an equity in the property was acquired. The Tax Court in applying this test held that since the amount due on the remaining portion of the lease greatly exceeded the appraisal value of the property, Wilshire Holding Corporation had not yet acquired an equity. We, however, do not believe that this method

of determining whether an equity has been acquired is correct. From 1929 to 1946 Wilshire Holding Corporation paid approximately $160,000 to the lessor. In 1997 it will acquire property appraised at $100,000 in 1946 and worth perhaps ten times as much by 1997. Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity. In *Chicago Stoker Corp.*, 14 T.C. 44 (1950), the court said that if the payments made under the "lease" are large enough to exceed the value of the property less depreciation, the lessee is receiving an equity in the property. Although the *Stoker* case is distinguishable on its facts, the same principle should apply here.

However, even if the Tax Court was correct in holding that Wilshire has not acquired an equity, the alternative ground that they are taking title to the property is sufficient to disqualify the "rental" payments from being treated as a business expense.

Looking at this transaction from a long range view we find that if the opinion of the Tax Court is affirmed, Wilshire Holding Corporation, at the expiration of the "lease", will have acquired a very valuable piece of property for payments written off entirely as business expense while petitioner will have, in effect, sold a valuable piece of property without having been able to treat the proceeds as a long term capital gain.

We are of opinion that the Tax Court erred in treating the question of intention of the parties as one of fact

collateral to the written instrument. The document was not ambiguous, and evidence as to surrounding circumstances was not required to explain it. The intention of the parties, as expressed in the instrument, was cardinal, as has been said above. The document has here been construed in the light of the applicable statute. No question of fact was involved. One who contracts to purchase real property acquires an equity therein immediately on the signing of the contract to purchase and taking possession. This equity increases with every payment. No comparision of the value of the realty and the amount of rental paid at any given time has any validity.

The decision of the Tax Court is REVERSED.

(Endorsed:) Opinion. Filed Oct. 29, 1955.

Paul P. O'Brien, Clerk.

APPENDIX E.

Order.

United States Court of Appeals, for the Ninth Circuit.

Commissioner of Internal Revenue, Petitioner, vs. Wilshire Holding Corporation, Respondent. No. 14,100.

Now on this day this cause coming on to be heard on the motion of the petitioner by his attorney that the decision of the Tax Court in the above entitled case be summarily reversed on the basis of this Court's opinion of October 29, 1955 in the companion case of Walburga Oesterreich vs. Commissioner of Internal Revenue No. 13,924 and the Court having given full consideration to said consolidated cases and being now fully advised in the premises, it is hereby

ORDERED and adjudged that the decision of the Tax Court in the above entitled cause be and the same is hereby reversed.

James Alger Fee,
Richard H. Chambers,
Circuit Judges.
Dave W. Ling,
District Judge.

(Endorsed:) Memorandum and Order. Filed Dec. 6, 1956.

Paul P. O'Brien, Clerk

APPENDIX F.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Commissioner of Internal Revenue, Petitioner, vs. Wilshire Holding Corporation, Respondent. No. 14,100.

A motion has been filed by the Commissioner of Internal Revenue in the above entitled cause, that the decision of the Tax Court therein be summarily reversed.

The above entitled case was consolidated in the Tax Court with the case of Walburga Oesterreich v. Commissioner of Internal Revenue No. 13,924. Pursuant to a stipulation of the parties proceedings on appeal in the above entitled case No. 14,100 have been held in abeyance pending the decision of the court in the Oesterreich case No. 13,924. The Wilshire Holding Company had its day in court since it was permitted to file a brief amicus curiae in the Oesterreich case and was permitted to use the full time assigned to the respondent for oral argument in the latter case.

This court in the Oesterreich case upon full consideration filed an opinion the effect of which was to determine the cause in favor of Walburga Oesterreich in No. 13,924 and against Wilshire Holding Company in the above entitled cause which was inseparably connected therewith.

Thereafter, this court denied a petition of Wilshire Holding Company for leave to file a petition for rehearing in the Oesterreich case.

The Clerk of this Court has received a representation (which is in the official records here and which this

court elects to treat as a motion) by counsel for Walburga Oesterreich suggesting that the Commissioner of Internal Revenue among other things refuses to process the tax for years subsequent to 1946 and therefore requests the court to entertain a petition requiring the Commissioner to show cause why he should not proceed with such processing.

The court finding no reason why determination should now be delayed summarily reverses the determination in the above entitled cause No. 14,100 based upon the previous determination and opinion in the companion case of Walburga Oesterreich vs. Commissioner of Internal Revenue No. 13,924.

James Alger Fee,
Richard H. Chambers,
Circuit Judges.

Dave W. Ling,
District Judge.

APPENDIX G.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Commissioner of Internal Revenue, *Petitioner*, vs. Wilshire Holding Corporation, *Respondent*. No. 16,678, Nov. 28, 1960.

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges

CHAMBERS, Circuit Judge:

In Wilshire Holding Corporation v. Commissioner, 262 F.2d 51, we indicated that so-called rental payments (which in Oesterreich v. Commissioner, 226 F. 2d 798, and Commissioner v. Wilshire Holding Corp., 244 F.2d 904, were determined to be installment payments on purchase) might be apportioned between principal and interest. The case was remanded for consideration of this point.

Back again before the Tax Court, the Commissioner ignored in his proposed computation of taxpayer's federal income taxes for the years 1945 and 1946 at suit any allowance for interest.

Conversely, the taxpayer, with the opening we gave it, took the selling price as $75,000, being a fair value of the property in 1929. Then it set up an amortization on this basis which will result in a fantastic rate of interest in the latter years of the contract. The so-called rental payments total $697,380 over a period of 67 years and eight months.

We hold to our basic proposition heretofore suggested that there should be an apportionment of the payments between principal and interest. Of the justice of this we are sure. At the time the "lease" was entered into the highest legal rate at the situs—California—was 12 per cent per annum. Probably that rate was much higher than the normal going rate.

Had the Tax Court found a going rate, used it in an amortization, with each payment being applied first to interest, then to principal (the calculation is complicated, but it can be done, and a principal amount evolved), we would have been inclined to uphold it. We think the money which cannot be allowed as interest must be assigned to principal or the price.

However, the Commissioner gave the Tax Court no help. He still tried to disallow interest, our suggestion notwithstanding. In the conduct of a case, we think that the government must accept the consequences of what its attorneys do.

The allowance of Wilshire's rate of interest reaching in the 68th year about 800% per annum, though it has some logic, we would regard as out of order. When a court itself selects an interest rate for parties it ought to stay within legal rates. Perhaps United States v. National Wholesalers, 236 F.2d 944, is authority, where we refused to approve an army officer's conduct contrary to public policy. Here we deal with legality and public policy, without the strong overtones of morality in National Wholesalers.

This time we shall say nothing about Mrs. Oesterreich's taxes.

There is no case here for depreciation because the "rental" converted by us into a "sale" was of Mrs. Oesterreich's vacant lots. But it is our underlying belief that if a taxpayer has his labels changed by the government he is entitled to the normal incidents of the new label.

Reversed for proceedings consistent herewith.

(Endorsed) Opinion Filed Nov. 28, 1960.

Frank H. Schmid, Clerk.

APPENDIX H.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Wilshire Holding Corporation, *Petitioner*, vs. Commissioner of Internal Revenue, *Respondent*. No. 15,971, Nov. 28, 1958.

Petition to Review a Decision of the Tax Court of the United States.

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges

PER CURIAM:

Under a 1929 instrument called a "lease" affecting a single piece of real estate in Los Angeles, Wilshire Holding Company's predecessor agreed to pay a total of $679,380.00 in "rent" over a period of 68 years to Walburge Oesterreich, owner. At the end of the term the "lessee" would acquire full title by making a nominal payment of ten dollars.

On income tax consequences of the transaction, we have had two companion cases, Oesterreich v. Commissioner, 9 Cir., 226 F.2d 798, and Commissioner of Internal Revenue v. Wilshire Holding Corporation, 9 Cir., 244 F.2d 905. The two cases came up simultaneously from the Tax Court.

For some years after the "lease" was executed the Commissioner of Internal Revenue accepted it as it was labeled, giving the "lessee" a deduction for "rent" payments and charging the lessor with receipt of ordinary income. Eventually, the Commissioner reversed himself, taking the position on subsequent installments that

they were payments on a purchase price, not rent. The issues went to the Tax Court, which as to both taxpayers, took the view that the labels on the agreement were correct and held Commissioner's second position was wrong.

Our considered opinion on the issue is in Oesterreich v. C.I.R., supra. Deeming that Wilshire had been fully heard at the argument on Oesterreich, we reversed the Wilshire case in a per curiam opinion, C.I.R. v. Wilshire Holding Corporation, supra.

In the Oesterreich case, confirmed in our ruling in Wilshire, we held, tested objectively and without parol evidence, the legal effect of the "lease" was a sale and purchase and not a rental of real estate with an ultimate sale for ten dollars. Wilshire sought certiorari which was denied, 355 U.S. 815, 879.

Both cases went back to the Tax Court and Wilshire is here again. On the second appearance before the Tax Court Wilshire sought to apportion each monthly payment between purchase price and "rent" for the land. Wilshire relied heavily upon a sentence in Oesterreich (page 803): "Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity." This contention of apportionment between rent and purchase price the Tax Court has rejected. This, on review, we hold was correct. The tax law just does not contemplate that one may be a renter and buyer at the same time of the same thing. If one is acquiring an equity in the property, he cannot simultaneously be the lessee for tax purposes.

However, we do not construe our holding in the two cases as preventing the Tax Court or the Commissioner

from considering whether a formula should be adopted on an amortized basis of apportioning the monthly payments between principal and interest. We assume if such is appropriate a mathematical formula and an appropriate legal interest rate may be found.

A quicker conclusion might be brought to this litigation if this court would now rule on this question of an allowance to Wilshire for interest. But it is deemed more appropriate that the Tax Court first consider the question of whether Wilshire is entitled to apportion part of each payment to "interest paid." Roughly, interest is the rental price of money.

It may be argued that our ruling does not have sufficient "ground" in the way of a legal point made in the Tax Court, or here in the assignment of error. However, it is apparent that the Tax Court thought it was required by us to treat every dollar paid by Wilshire as a capital payment. Upon this misapprehension, the case as renewed there proceeded. Under the circumstances, we hold the point made by Wilshire there and here, while wrong, is sufficiently broad to permit consideration of a division between principal and interest. Wilshire indicates it wants to make some other deductions. We think such are now too late. It is the law of the case that the monthly payments are not rental payments for income tax purposes. The payments are for the purchase of the property as we have previously held. The question of an allocation of the payments between principal and interest is still open. That is all.

We are confident that the Tax Court will give the seller-lessor, Oesterreich, due opportunity to be heard so that there may be consistent results for both taxpayers.

Reversed for proceedings consistent with this opinion.

(Endorsed:) Per Curiam Opinion. Filed Nov. 28, 1958.

Paul P. O'Brien, Clerk.

APPENDIX I.

Exhibit 18 as Part of Deposition of Robert Mason.

Showing interest at 7% with allocation of entire installments for first ten years to interest, requiring escalation of Principal to $107,142.86.

Payment Number	Net Interest	Principal Payment	Balance of Loan
1		625.00	107,142.86
2	625.00	.00	107,142.86
3	625.00	.00	107,142.86
4	625.00	.00	107,142.86
5	625.00	.00	107,152.86
6	625.00	.00	107,142.86
7	625.00	.00	107,142.86
8	625.00	.00	107,142.86
9	625.00	.00	107,142.86
10	625.00	.00	107,142.86
11	625.00	.00	107,142.86
12	625.00	.00	107,142.86
13	625.00	.00	107,142.86
14	625.00	.00	107,142.86
15	625.00	.00	107,142.86
16	625.00	.00	107,142.86
17	625.00	.00	107,142.86
18	625.00	.00	107,142.86
19	625.00	.00	107,142.86
20	625.00	.00	107,142.86
21	625.00	.00	107,142.86
22	625.00	.00	107,142.86
23	625.00	.00	107,142.86
24	625.00	.00	107,142.86
25	625.00	.00	107,142.86
26	625.00	.00	107,142.86
27	625.00	.00	107,142.86

Payment Number	Net Interest	Principal Payment	Balance of Loan
28	625.00	.00	107,142.86
29	625.00	.00	107,142.86
30	625.00	.00	107,142.86
31	625.00	.00	107,142.86
32	625.00	.00	107,142.86
33	625.00	.00	107,142.86
34	625.00	.00	107,142.86
35	625.00	.00	107,142.86
36	625.00	.00	107,142.86
37	625.00	.00	107,142.86
38	625.00	.00	107,142.86
39	625.00	.00	107,142.86
40	625.00	.00	107,142.86
41	625.00	.00	107,142.86
42	625.00	.00	107,142.86
43	625.00	.00	107,142.86
44	625.00	.00	107,142,86
45	625.00	.00	107,142.86
46	625.00	.00	107,142.86
47	625.00	.00	107,142.86
48	625.00	.00	107,142.86
49	625.00	.00	107,142.86
50	625.00	.00	107,142.86
51	625.00	.00	107,142.86
52	625.00	.00	107,142.86
53	625.00	.00	107,142.86
54	625.00	.00	107,142.86
55	625.00	.00	107,142.86
56	625.00	.00	107,142.86
57	625.00	.00	107,142.86
58	625.00	.00	107,142.86
59	625.00	.00	107,142.86
60	625.00	.00	107,142.86
181	468.39	531.61	79,763.90

Payment Number	Net Interest	Principal Payment	Balance of Loan
182	465.29	534.71	79,229.19
183	462.17	537.83	78,691.36
184	459.03	540.97	78,150.39
185	455.88	544.12	77,606.27
186	452.70	547.30	77,058.97
187	449.51	550.49	76,508.48
188	446.30	553.70	75,954.78
189	443.07	556.93	75,397.85
190	439.82	560.18	74,837.67
191	436.55	563.45	74,274.22
192	433.27	566.73	73,707.49
193	429.96	570.04	73,137.45
194	426.64	573.36	72,564.09
195	423.29	576.71	71,987.38
196	419.93	580.07	71,407.31
197	416.54	583.46	70,823.85
198	413.14	586.86	70,236.99
199	409.72	590.28	69,646.71
200	406.27	593.73	69,052.98
201	402.81	597.19	68,455.79
202	399.33	600.67	67,855.12
203	395.82	604.18	67,250.94
204	392.30	607.70	66,643.24
205	388.75	611.25	66,031.99
206	385.19	614.81	65,417.18
207	381.60	618.40	64,798.78
208	377.99	622.01	64,176.77
209	374.36	625.64	63,551.13
210	370.71	629.29	62,921.84
211	367.04	632.96	62,288.88
212	363.35	636.65	61,652.23
213	359.64	640.36	61,011.87
214	355.90	644.10	60,367.77
215	352.15	647.85	59,719.92

Payment Number	Net Interest	Principal Payment	Balance of Loan
216	348.37	651.63	59,068.29
217	344.57	655.43	58,412.86
218	340.74	659.26	57,753.60
219	336.90	663.10	57,090.50
220	333.03	666.97	56,423.53
221	329.14	670.86	55,752.67
222	325.22	674.78	55,077.89
223	321.29	678.71	54,399.18
224	317.33	682.67	53,716.51
225	313.35	686.65	53,029.86
226	309.34	690.66	52,339.20
227	305.31	694.69	51,644.51
228	301.26	698.74	50,945.77
229	297.18	702.82	50,242.95
230	293.08	706.92	49,536.03
231	288.96	711.04	48,824.99
232	284.81	715.19	48,109.80
233	280.64	719.36	47,390.44
234	276.44	723.56	46,666.88
235	272.22	727.78	45,939.10
236	267.98	732.02	45,207.08
237	263.71	736.29	44,470.79
238	259.41	740.59	43,730.20
239	255.09	744.91	42,985.29
240	250.75	749.25	42,236.04
241	246.38	753.62	41,482.42
242	241.98	758.02	40,724.40
243	237.56	762.44	39,961.96
244	233.11	766.89	39,195.07
245	228.64	771.36	38,423.71
246	224.14	775.86	37,647.85
247	219.61	780.39	36,867.46
248	215.06	784.94	36,082.52
249	210.48	789.52	35,293.00

Payment Number	Net Interest	Principal Payment	Balance of Loan
250	205.88	794.12	34,498.88
251	201.24	798.76	33,700.12
252	196.58	803.42	32,896.70
253	191.90	808.10	32,088.60
254	187.18	812.82	31,275.78
255	182.44	817.56	30,458.22
256	177.67	822.33	29,635.89
257	172.88	827.12	28,808.77
258	168.05	831.95	27,976.82
259	163.20	836.80	27,140.02
260	158.32	841.68	26,298.34
261	153.41	846.59	25,451.75
262	148.47	851.53	24,600.22
263	143.50	856.50	23,743.72
264	138.51	861.49	22,882.23
265	133.48	866.52	22,015.71
266	128.42	871.58	21,144.13
267	123.34	876.66	20,267.47
268	118.23	881.77	19,385.70
269	113.08	886.92	18,498.78
270	107.91	892.09	17,606.69
271	102.71	897.29	16,709.40
272	97.47	902.53	15,806.87
273	92.21	907.79	14,899.08
274	86.91	913.09	13,985.99
275	81.58	918.42	13,067.57
276	76.23	923.77	12,143.80
277	70.84	929.16	11,214.64
278	65.42	934.58	10,280.06
279	59.97	940.03	9,340.03
280	54.48	945.52	8,394.51
281	48.97	951.03	7,443.48
282	43.42	956.58	6,486.90
283	37.84	962.16	5,524.74

Payment Number	Net Interest	Principal Payment	Balance of Loan
284	32.23	967.77	4,556.97
285	26.58	973.42	3,583.55
286	20.90	979.10	2,604.45
287	15.19	984.81	1,619.64
288	9.45	990.55	629.09
289	3.67	629.09	632.76*

Exhibit 19 as Part of Deposition of Robert Mason.

Showing interest at 7% per annum pm $75,000.

1		625.00	74,375.00
2	433.85	191.15	74,183.85
3	432.74	192.26	73,991.59
4	431.62	193.38	73,798.21
5	430.49	194.51	73,603.70
6	429.35	195.65	73,408.05
7	428.21	196.79	73,211.26
8	427.07	197.93	73,013.33
9	425.91	199.09	72,814.24
10	424.75	200.25	72,613.99
11	423.58	201.42	72,412.57
12	422.41	202.59	72,209.98
13	421.22	203.78	72,006.20
14	420.04	204.96	71,801.24
15	418.84	206.16	71,595.08
16	417.64	207.36	71,387.72
17	416.43	208.57	71,179.15
18	415.21	209.79	70,969.36
19	413.99	211.01	70,758.35
20	412.76	212.24	70,546.11
21	411.52	213.48	70,332.63
22	410.27	214.73	70,117.90
23	409.02	215.98	69,901.92

Payment Number	Net Interest	Principal Payment	Balance of Loan
24	407.76	217.24	69,684.68
25	406.49	218.51	69,466.17
26	405.22	219.78	69,246.39
27	403.94	221.06	69,025.33
28	402.65	222.35	68,802.98
29	401.35	223.65	68,579.33
30	400.05	224.95	68,354.38
31	398.73	226.27	68,128.11
32	397.41	227.59	67,900.52
33	396.09	228.91	67,671.61
34	394.75	230.25	67,441.36
35	393.41	231.59	67,209.77
36	392.06	232.94	66,976.83
37	390.70	234.30	66,742.53
38	389.33	235.67	66,506.86
39	387.96	237.04	66,269.82
40	386.57	238.43	66,031.39
41	385.18	239.82	65,791.57
42	383.78	241.22	65,550.35
43	382.38	242.62	65,307.73
44	380.96	244.04	65,063.69
45	379.54	245.46	64,818.23
46	378.11	246.89	64,571.34
47	376.67	248.33	64,323.01
48	375.22	249.78	64,073.23
49	373.76	251.24	63,821.99
50	372.29	252.71	63,569.28
51	370.82	254.18	63,315.10
52	369.34	255.66	63,059.44
53	367.85	257.15	62,802.29
54	366.35	258.65	62,543.64
55	364.84	260.16	62,283.48
56	363.32	261.68	62,021.80
57	361.79	263.21	61,758.59

Payment Number	Net Interest	Principal Payment	Balance of Loan
58	360.26	264.74	61,493.85
59	358.71	266.29	61,227.56
60	357.16	267.84	60,959.72
61	355.60	269.40	60,690.32
62	354.03	270.97	60,419.35
63	352.45	272.55	60,146.80
64	350.86	274.14	59,872.66
65	349.26	275.74	59,596.92
66	347.65	277.35	59,319.57
67	346.03	278.97	59,040.60
68	344.40	280.60	58,760.00
69	342.77	282.23	58,477.77
70	341.12	283.88	58,193.89
71	339.46	285.54	57,908.35
72	337.80	287.20	57,621.15
73	336.12	288.88	57,332.27
74	334.44	290.56	57,041.71
75	332.74	292.26	56,749.45
76	331.04	293.96	56,455.49
77	329.32	295.68	56,159.81
78	327.60	297.40	55,862.41
79	325.86	299.14	55,563.27
80	324.12	300.88	55,262.39
81	322.36	302.64	54,959.75
82	320.60	304.40	54,655.35
83	318.82	306.18	54,349.17
84	317.04	307.96	54,041.21
85	315.24	309.76	53,731.45
86	313.43	311.57	53,419.88
87	311.62	313.38	53,106.50
88	309.79	315.21	52,791.29
89	307.95	317.05	52,474.24
90	306.10	318.90	52,155.34
91	304.24	320.76	51,834.58

Payment Number	Net Interest	Principal Payment	Balance of Loan
92	302.37	322.63	51,511.95
93	300.49	324.51	51,187.44
94	298.59	326.41	50,861.03
95	296.69	328.31	50,532.72
96	294.77	330.23	50,202.49
97	292.85	332.15	49,870.34
98	290.91	334.09	49,536.25
99	288.96	336.04	49,200.21
100	287.00	338.00	48,862.21
101	285.03	339.97	48,522.24
102	283.05	341.95	48,180.29
103	281.05	343.95	47,836.34
104	279.05	345.95	47,490.39
105	277.03	347.97	47,142.42
106	275.00	350.00	46,792.42
107	272.96	352.04	46,440.38
108	270.90	354.10	46,086.28
109	268.84	356.16	45,730.12
110	266.76	358.24	45,371.88
111	264.67	360.33	45,011.55
112	262.57	362.43	44,649.12
113	260.45	364.55	44,284.57
114	258.33	366.67	43,917.90
115	256.19	368.81	43,549.09
116	254.04	370.96	43,178.13
117	251.87	373.13	42,805.00
118	249.70	375.30	42,429.70
119	247.51	377.49	42,052.21
120	245.30	379.70	41,672.51
121*	243.09	756.91	40,915.60
122	238.67	761.33	40,154.27
123	234.23	765.77	39,388.50
124	229.77	770.23	38,618.27
125	225.27	774.73	37,343.54

Payment Number	Net Interest	Principal Payment	Balance of Loan
126	220.75	779.25	37,064.29
127	216.21	783.79	36,280.50
128	211.64	788.36	35,492.14
129	207.04	792.96	34,699.18
130	202.41	797.59	33,901.59
131	197.76	802.24	33,099.35
132	193.08	806.92	32,292.43
133	188.37	811.63	31,480.80
134	183.64	816.36	30,664.44
135	178.88	821.12	29,843.32
136	174.09	825.91	29,017.41
137	169.27	830.73	28,186.68
138	164.42	835.58	27,351.10
139	159.55	840.45	26,510.65
140	154.65	845.35	25,665.30
141	149.71	850.29	24,815.01
142	144.75	855.25	23,959.76
143	139.77	860.23	23,099.53
144	134.75	865.25	22,234.28
145	129.70	870.30	21,363.98
146	124.62	875.38	20,488.60
147	119.52	880.48	19,608.12
148	114.38	885.62	18,722.50
149	109.21	890.79	17,831.71
150	104.02	895.98	16,935.73
151	98.79	901.21	16,034.52
152	93.53	906.47	15,128.05
153	88.25	911.75	14,216.30
154	82.93	917.07	13,299.23
155	77.58	922.42	12,376.81
156	72.70	927.80	11,449.01
157	66.79	933.21	10,515.80
158	61.34	938.66	9,577.14
159	55.87	944.13	8,633.01

Payment Number	Net Interest	Principal Payment	Balance of Loan
160	50.36	949.64	7,683.37
161	44.82	955.18	6,728.19
162	39.25	960.75	5,767.44
163	33.64	966.36	4,801.08
164	28.01	971.99	3,829.09
165	22.34	977.66	2,851.43
166	16.63	983.37	1,863.06
167	10.90	989.10	878.96
168	5.13	878.96	884.09*

Order.

United States Court of Appeals, for the Ninth Circuit.

Estate of Walburga Hedrick, deceased, a.k.a. Walburga Oesterreich, Ray Bert Hedrick, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 26,292.

Before: CHAMBERS and JERTBERG, Circuit Judges, and CROCKER, District Judge.

The petition for rehearing of petition to review denied.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Commissioner v. *Sunnen*, 333 U.S. 591	5, 6, 8
Commissioner v. *Tower*, 327 U.S. 280	8
Commissioner v. *Wilshire Holding Corp.*, 244 F. 2d 904, reversing 12 T.C.M. 277, certiorari denied, 355 U.S. 815, rehearing denied 355 U.S. 879	3
Helvering v. *Clifford*, 309 U.S. 331	8
Helvering v. *Eubank*, 311 U.S. 122	8
Helvering v. *Horst*, 311 U.S. 112	8
Harrison v. *Schaffner*, 312 U.S. 579	8
Lusthaus v. *Commissioner*, 327 U.S. 293	
Oesterreich v. *Commissioner*, 226 F. 2d 798, reversing 12 T.C.M. 277	3, 5, 6, 7
Robinson v. *Elliot*, 262 F. 2d 383	7, 8
Starr's Estate v. *Commissioner*, 274 F. 2d 294	7, 8
Wilshire Holding Corp. v. *Commissioner*, 262 F. 2d 51	7, 8

Constitution and statutes:

	Page
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 483	2, 9
Sec. 6501	2, 8
Revenue Act of 1964, P.L. 88-272, 78 Stat. 77, Sec. 224(a)	7
Constitution of the State of California, Art. 20, § 22	9
Civil Code, West's Ann. Calif. Codes, Sec. 1916-2	9

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-454

ESTATE OF WALBURGA HEDRICK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the Tax Court may be found in 23 T.C.M. 1374 and 28 T.C.M. 1223, but are not officially reported. The opinions of the court of appeals (Pet. App. 1, 4-7) are reported at 406 F. 2d 587 and 457 F. 2d 501.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1972 (Pet. App. 1), and the petition

for a rehearing was denied on June 29, 1972. The petition for a writ of certiorari was filed on September 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In an earlier case involving tax year 1946, a lease on petitioner's real property was held to constitute a sales contract for purposes of the federal income tax and the payments petitioner received under that contract during 1946 were held to be installment purchase payments. In the instant case, the court below held that the installment payments for years subsequent to 1946 included both amounts amortizing the purchase price—taxable as capital gains—and interest payments accrued upon the still-outstanding balance of the purchase price—taxable as ordinary income. The issues here presented are:

1. Whether the doctrine of collateral estoppel bars the holding that part of the payments constituted interest.

2. Whether the installment payments were properly apportioned for tax purposes between interest and principal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of Sections 453 and 483 of the Internal Revenue Code of 1954, the Constitution of the State of California, and the California Civil

Code and Code of Civil Procedure are set out at pages 6-12 of the Petition.

STATEMENT

In 1929, petitioner "leased" three parcels of real property to the Wilshire Amusement Corporation for a term of 67 years, 8 months. The "lease" agreement provided for rental payments of $7,500 per year for the first 10 years, $12,000 annually for the succeeding 18 years and progressively declining amounts over the remainder of the term. The lease provided that at the end of the "lease" term, Wilshire was entitled to acquire title to the property for an additional payment of $10. (Pet. App. 9-10.)

The income tax treatment of petitioner's receipts and the "lessee's" expenditures under this "lease" agreement came before the Court of Appeals for the Ninth Circuit in *Oesterreich* v. *Commissioner*, 226 F. 2d 798, reversing 12 T.C.M. 277, and *Commissioner* v. *Wilshire Holding Corp.*, 244 F. 2d 904, reversing 12 T.C.M. 277, certiorari denied, 355 U.S. 815, rehearing denied, 355 U.S. 879. In these cases, the "lease" agreement was held for tax purposes to constitute a contract for the sale of petitioner's property and the payments petitioner received in the tax year 1946 were consequently held to be installment purchase payments rather than rental income as initially reported. The court of appeals reasoned that the $10 option price for which Wilshire could acquire title to property which would apparently be worth over $100,000 on the option date was obviously not the actual consideration petitioner would receive for

the sale of the property, and held that the payments which the parties had characterized as rent were actually the purchase payments for the property. (Pet. App. 8-17, 19-20.)

The instant case involves payments petitioner received for years subsequent to those in issue in the earlier cases. The Commissioner of Internal Revenue determined that for those succeeding years taxes should be based upon the premise that a portion of each payment petitioner received should be attributable to interest accrued upon the total purchase price still outstanding, as in the case of an ordinary mortgage, and that the portion of the payments allocable to interest should be taxed as ordinary income. In order to allocate between interest and principal, the Commissioner used an amortization schedule based upon an 11.9 percent interest rate. The Tax Court (23 T.C.M. 1374 (1964)) upheld the deficiency determined on this basis. The court of appeals held that its earlier decision involving petitioner did not collaterally bar the Commissioner from treating the subsequent receipts partially as interest, on the ground that there had been such a change in the legal climate since the first opinion as to render the bar of collateral estoppel inoperative. The court held, however, (Pet. App. 4-7), that the Tax Court had erred in upholding the Commissioner's use of an amortization table based on such a high rate of interest, and remanded the case to the Tax Court for a redetermination of the deficiency based upon an amortization schedule bearing a lower rate of interest. On remand

(28 T.C.M. 1223), the Tax Court apportioned the petitioner's receipts between principal and interest in accordance with a seven-percent amortization schedule. The court of appeals affirmed (Pet. App. 1).

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other consideration warranting further review. Moreover, the substantive tax issue here has been resolved for the future by an amendment to the Internal Revenue Code of 1954.

1. The decision below was not collaterally barred by the Ninth Circuit's earlier decision, *Oesterreich* v. *Commissioner*, 226 F. 2d 798. (Pet. App. 8-17.) The limited scope of collateral estoppel in federal income tax cases was defined by this Court in *Commissioner* v. *Sunnen*, 333 U.S. 591. After noting that taxes are levied on an annual basis and that, therefore, a judgment on the merits for one tax year does not conclude all tax questions as to later years, the Court stated (p. 598): "* * * if * * * [a] later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit." And the sweep of collateral estoppel within even that limited area was further restricted by the Court, which noted that the doctrine of collateral estoppel was (pp. 599-600)—

> * * * designed to prevent repetitious lawsuits over matters which have once been decided and

> which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.
>
> And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. * * * a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.

The court in *Oesterreich* viewed (Pet. App. 11) the "sole issue" before it as whether the 1929 agreement was "a lease or a contract for the sale of land." (226 F. 2d at 801.) Having decided that the agreement was a sales contract, it concluded, without further discussion, that petitioner's 1946 receipts were taxable at capital gains rates. The instant case presents an issue not addressed by the parties in *Oesterreich*—whether the petitioner's installment receipts contain an element of interest accrued upon the sales price which should be taxed as ordinary income. Since that issue was not before the court in *Oesterreich*, it is not now foreclosed by the decision in that case. *Commissioner* v. *Sunnen*, *supra*.

Moreover, there has been a substantial change in the relevant "legal atmosphere" since the entry of the

Oesterreich decision. In *Wilshire Holding Corp.* v. *Comissioner*, 262 F. 2d 51 (C.A. 9), *Robinson* v. *Elliot*, 262 F. 2d 383 (C.A. 9), and *Starr's Estate* v. *Commissioner*, 274 F. 2d 294 (C.A. 9), lease agreements were recast as contracts of sale for tax purposes and, in each instance, payments made pursuant to these lease-sale agreements were held to constitute in part the payment of principal and in part the payment of interest accrued upon the outstanding principal. Further, in the Revenue Act of 1964, P.L. 88-272, 78 Stat. 77, Section 224(a), the Congress passed Section 483 of the Internal Revenue Code of 1954, which expresses a Congressional recognition that sales contracts with long payment periods inherently contain some element of interest. These changes in the legal atmosphere have lifted the collateral bar which petitioner would attribute to the *Oesterreich* decision.

Petitioner contends (Pet. 22-23) that since the change in the legal atmosphere did not occur until after some of the years here in issue, those early years should be taxed as though there had been no change in the operative rule from that laid down in *Oesterreich*. In other words, while not claiming a vested right in perpetuity to the tax treatment set out in the *Oesterreich* opinion, petitioner seeks to establish a vested right in that treatment until the date on which the legal atmosphere actually changed. None of the years which petitioner seeks to have taxed under the *Oesterreich* rule, however, were barred by the statute of limitations. Internal Revenue

Code of 1954, Sec. 6501. In fact, some of the years petitioner seeks to immunize from the tax treatment dictated by *Wilshire Holding Corp.* v. *Commissioner, supra, Robinson* v. *Elliot, supra,* and *Starr's Estate* v. *Commissioner, supra,* occurred well after the tax years involved in those very cases. Petitioner's proposed application of collateral estoppel thus would lead to what this Court sought to avoid in *Sunnen*—"inequities among taxpayers." [1]

2. The allocation of petitioner's receipts between principal and interest was correct. The court below approved a division between principal and interest based upon a seven-percent amortization schedule. This schedule was derived by applying an interest factor to the schedule of payments set out in the "lease" and working backwards over the term of the "lease." Each scheduled payment was first applied to interest and then to principal, in the fashion of a normal mortgage financing arrangement. The seven-percent interest rate utilized in the calculations comports with both the rate of interest the parties themselves agreed would apply to overdue payments and to the rate of interest payable on judgments under the

[1] Indeed, this Court has implicitly rejected the claim petitioner asserts here. In *Sunnen,* changes in the prevailing legal climate heralded by decisions entered in the years 1940 (*Helvering* v. *Clifford,* 309 U.S. 331; *Helvering* v. *Horst,* 311 U.S. 112; *Helvering* v. *Eubank,* 311 U.S. 122), 1941 (*Harrison* v. *Schaffner,* 312 U.S. 579), and 1946 (*Commissioner* v. *Tower,* 327 U.S. 280; *Lusthaus* v. *Commissioner,* 327 U.S. 293) were held sufficient to remove all collateral bars to the proper tax treatment of income received in 1937, a full three years prior to the change in legal climate.

applicable state law. Constitution of the State of California, Art. 20, Sec. 22.[2] The amortization schedule thus represents the most realistic allocation that could now be devised.

3. The issue here presented has been settled for the future by an amendment to the Internal Revenue Code of 1954. Under Section 483 of the Code, passed as a part of the Revenue Act of 1964, *supra*, sales contracts with deferred payment schedules must provide that deferred amounts earn interest. If the sales contract provides for less than an adequate amount of interest on the outstanding balance, additional interest will be apportioned to the parties in accordance with the system set forth in Section 483. The instant case thus does not present any issue of ongoing administrative importance. Nor can the petitioner point to any decision in conflict with the holding below. Instead, the instant case presents the last example of a judicial solution to the tax abuse inherent in the "interest-free" loan. The solution

---

[2] Petitioner complains (Pet. 21) that there is compounding of interest under the amortization schedule, which it asserts is forbidden by applicable California law. California law, however, permits compounding when agreed to in writing by the party to be charged. Civ. Code, West's Ann. Calif. Codes, § 1916-2. Quite apart from the fact that petitioner, as the recipient of compounded interest, is hardly in a position to assert Wilshire's objections to that interest, the schedule of payments to which the parties agreed in writing implicitly provides for compounding. The payments for the early years were so small, and those for later years so large, that any amortization schedule providing an even rate of return over the entire term would have to provide for compounding the deficiencies in interest incurred in the early years.

reached in this case was correct and clearly permissible under the doctrine of collateral estoppel. There is no reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

MEYER ROTHWACKS,
MICHAEL L. PAUP,
Attorneys.

OCTOBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 479089 289

FILE COPY

NOV 5 1972

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-454

ESTATE OF WALBURGA HEDRICK,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

CHAS. I. POHN,
406 South Spring Street,
Los Angeles, Calif. 90013,
(213) 628-7020,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6432

SUBJECT INDEX

	Page
Statement	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Argument	3
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

Oesterreich v. Commissioner, 226 F.2d 798 .....5, 6

Robinson v. Commissioner, 439 F.2d 767 8

Shanahan v. United States, 477 F.2d 1082 8

Wilshire v. Commissioner, 262 F.2d 51 ....3, 5, 6, 7, 13

Statutes

California Code of Civil Procedure, Sec. 336 7

Internal Revenue Code, Sec. 483 .....7, 13

Internal Revenue Code, Sec. 6501 7

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-454

ESTATE OF WALBURGA HEDRICK,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

Statement.

The statement set out in Respondent's brief is generally correct in supplementing petitioner's statement. There should be added however, to the third line on page 5, that the amortization schedule at seven percent, provided for the seven percent interest to be "compound interest" on assumed unpaid interest as established by respondent, said assumed interest being in excess of the provided for installment payments in the contract.

Questions Presented.

The questions presented are set out in the opening brief. In Respondent's brief, only two of those questions are mentioned, and the important question upon which the opinion of the Court of Appeal is entirely based, to-wit "Is the Tax Court opinion the Law of the Case" is omitted either in the category of Questions Raised or in the argument.

Constitutional Provisions and Statutes Involved.

These have been set out in the opening brief by petitioner.

ARGUMENT.

Replying to Respondent's brief in opposition, petitioner respectfully calls attention to the erroneous assumption of fact, evidence, and record to support his argument, and that argument is based on such erroneous postulate, as hereafter set out. In addition thereto, petitioner calls attention to the fact that on a number of questions presented by petitioner, which he believes to be important, there is no answer or refutation, included in which are the following and upon which we do not submit extended argument for the reason that it has been covered in the opening brief. These points not refuted are:

1. That the decision of the Court of Appeals is not in conformity with existing law and that petition should be granted to obtain conformity on important questions set out in the petition,

2. That the change in legal climate contended by Respondent is for conforming to the Wilshire case (*Wilshire v. Comm'r.*, 262 F.2d 51) the opinion in which is the result of misinformation and misrepresentation to the court as to the record in the case by its counsel,

3. That the decision of the Court of Appeals by affirming the Tax Court approves a decision in violation of the Constitution of the State of California relating to usury,

4. That the decision of the Court of Appeals in reaffirming the Tax Court, approves disregard of state statutory law and the Internal Revenue Code.

5. That in approving the Tax Court decision, the Court of Appeals, approves retroactive application of law, ex post facto law, and a violation of due process,

6. That approval of the Tax Court decision by the Court of Appeals totally disregards the statute of limitations,

7. That a denial of the granting of this petition will result in a multiplicity of suits for the reason that respondent has filed another assessment and the matter is now in the Tax Court (Docket 362370) covering the years 1966, 1967 and 1968 on the same source of income, which will be disposed of by the granting of petition herein but by reason of additional questions included in said proceeding, will require further adjudication if this petition is denied.

Among the questions not replied to is the sole and only point on which the Court of Appeals in the latest appeal in No. 26292 affirmed the decision of the Tax Court after reversal by the said Court of Appeals in #20005 of the previous decision of the Tax Court, and the new trial by the Tax Court after such reversal, is the question: Is the Court of Appeals correct in stating that the decision of the Tax Court in pursuance of Court of Appeals decision in #20005, has become the law of the case so that the appeal of petitioner has become moot. The authorities, as cited in the opening brief, hold that it is not, and indicate that the decision of the Court of Appeals is not in conformity with the law as uniformly stated in numerous decisions. (P. 20, Note Opening Brief.)

This question being the sole reason given for affirmance of the Tax Court decision, it becomes para-

mount. In view of the prior reversal, the complete retrial of the matter, with new evidence, new witnesses, and new issues and new decisions, not to disturb the opinion of the Court of Appeals in holding that a prior decision is the Law of the Case, would result in a great divergence from the existing law on the subject. The respondent in failing to reply to the question presented is a failure to question the merits of the point raised.

The first point replied to is that *Oesterreich v. Comm'r.*, 226 F.2d 798 is not collateral estoppel in assessing for later years. Practically all of said argument is directed to the argument that the rule is that manner of assessment for one year does not bind the commissioner for assessing differently for later years where there is a change of circumstances or change of legal climate. We do not believe that the rule applies in this instance where there was no change in circumstance and the change in legal climate contended by respondent is not applicable here: (1) the supposed change in legal climate in computing the basis for tax assessment is computed from more than thirty years prior (1929) to the said "change in legal climate" (*Wilshire v. Comm'r.*, 262 F.2d 51) in 1961; (2) that the income affected is a single continuing contract; (3) that the Court of Appeals (226 F.2d 798) in *Oesterreich*, has determined the tax treatment of the income on the whole contract and not for individual years only; (4) that *Wilshire v. Commissioner* (262 F.2d 51) as noted in the opening brief is a decision resulting from misinformation by Wilshire counsel to the court as to the state of the record in the litigation, upon which the court acted, and that it is improbable that the court would have made the same decision for

Wilshire if the court would not have such misinformation before it.

However to conform to the opinion of the Court of Appeals in remanding the case back to the Tax Court, the issue was abandoned in the latest hearing before the Tax Court and the appeal in the Court of Appeals and not further pursued. However, the argument in Respondent's brief is to the issue that determination of tax liability as to one year does not necessarily bar the Commissioner from assessing differently for later years when there is a change of circumstance or "legal climate". As to that there is no issue. The question previously raised is whether it is applicable in this instance. The cases cited by Respondent are therefore not pertinent here.

The only portion of respondent's argument on this subject that is not against a strawman and has any pertinence to the issue presented is the last paragraph on page 7 and completing on the top of page 8, wherein he says:

"While not claiming a vested right in perpetuity to the tax treatment set out in the *Oesterreich* opinion, petitioner seeks to establish a vested right in that treatment until the date on which the legal atmosphere changed."

Petitioner does not dispute that statement, but no reason is given why petitioner is not correct in being entitled to the benefit of *Oesterreich* until there is a circumstance or a change of legal climate, excepting to state that none of the years determined by *Oesterreich* (226 F.2d 798) in 1955, are barred from reconsideration in 1960 by the Statute of Limitations which is not an answer to the question of estoppel. As a reason why it

is not barred respondent cites I.R. Code Sec. 6501, but Sec. 6501 does not support him. It does however reinforce petitioner's position on the Statute of Limitations that any assessment made after three years of receipt of income is barred, here it goes back from 1929 to 1960—31 years. In addition to the Int. Rev. Code, as cited in the opening brief, the contended assumed indebtedness on which the assessment is made is barred by California statute after four years (California Code of Civil Procedure, Sec. 336). The Section of Int. Rev. Code cited by Respondent (6501) reads as follows:

> "SEC. 6501 LIMITATIONS ON ASSESSMENT AND COLLECTION
>
> (a) General Rule—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed (whether or not such return was filed on or after date prescribed), or if the tax is payable by stamp, within 3 years after such tax become due, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

On page 9 of his brief, Respondent refers to Sec. 483 of the Internal Revenue Code in his paragraph 3, which provided that where interest is not stated in a realty sales contract that in proper cases, the commissioner may include an interest charge up to five percent. This provision was enacted in 1964 and no mention is made in the answer to the point raised by the petitioner that application of this section as well as the Wilshire case which became final in 1961, to income from 1929 to 1960 is retroactive, *ex post facto,* and a violation of due process. The question of due

process raised by petitioner is one that this court is ordinarily very much interested in, yet there is no word from respondent why that constitutional right should not be considered by this court. Retroactive application of new law has consistently been held to be a violation of due process and has only been permitted where the new law specifically provides for it and then only for a reasonable period, held to be "reasonable" when such period is less than a year to include the beginning of a yearly accounting period, and certainly not for a period of thirty-one years.

Robinson v. Commissioner, 439 F.2d 767;
Shanahan v. United States, 477 F.2d 1082.

The second point answered by respondent is the proper application by the commissioner of the installment payments to principal and interest. As will be pointed out hereinbelow, the entire argument is based on fallacious postulates and presumptions not borne out by the record, for example he says:

> "Each scheduled payment was first applied to interest then to principal in the fashion of a normal mortgage financing arrangement. The seven percent interest rate utilized in the calculations comports with both the rate of interest the parties themselves agreed would apply to overdue payments and to the rate of interest on judgments under the applicable state law."

This statement is incorrect. The only places where a rate of interest is referred to in the lease in question is with reference to advancement of money to redeem the property from failure of Wilshire to pay property taxes when due, in which event petitioner is

to be reimbursed for the moneys advanced together with interest at seven percent per annum, and has no reference to installment payments, or compound interest and provides as follows:

> "Any such amounts so paid by Lessor shall become due and payable by Lessee to Lessor at or before the next rent day after such payment by Lessor together with interest thereon at the rate of 7% per annum from date of payment by Lessor until paid by Lessee".

The other reference to interest in the Agreement refers to the maximum rate of interest the first trust deed to which Lessor subordinates his title, may bear, reading:

> "The trust deed hereinbefore referred to shall bear interest at a rate of not to exceed 7% per annum, payable quarterly, and shall by its terms be amortized at a rate of not less than 5% per annum after the first two years from date."

Also referring to the above quoted paragraph from Respondent's brief, (p. 8) it is also untrue that as stated that from each payment application was made first to interest and then to principal. The record is undisputed as stated in the opening brief that in Respondent's computation that for the first ten years nothing was applied to principal but that an assumed principal or purchase price and an assumed rate of interest was established by respondent so that whereas the monthly installment payments provided for in the agreement and so paid was $625.00, the interest supposed to be earned was $750.00 resulting in an assumed unpaid indebtedness of $125.00 monthly and interest on said

assumed unpaid indebtedness was compounded from year to year, so that by the year 1942 Wilshire was supposed to owe petitioner $24,000 in unpaid interest in addition to the original amount of assumed principal. The original portion of the actual purchase price of $679,380.00, assumed by respondent to be the principal was approximately $138,000; by reason of assuming an interest rate on the assumed principal to be in excess of the provided-for installment payments which were paid in conformity with the agreement, the computation resulted in the year 1942 to be a principal on which interest was further compounded, to be $162,000, and though not actually owed, paid or received, was assessed yearly and said assumed, unpaid and not received interest was compounded from year to year, and on that manner of computation, this claimed liability of petitioner was assessed and is the basis of this proceeding. This state of the record does not conform to the quotation above from Respondent's brief, and it is apparent that respondent's counsel who prepared the brief is very unfamiliar with the record in this case and makes argument based on erroneous assumption of facts. Another example of his unfamiliarity with the record is the statement on page 9, note 2 stating:

> "Quite apart from the fact that petitioner as the recipient of compounded interest, is hardly in a position to assert Wilshire's objections to that interest, the schedule of payments to which the parties agreed implicitly provides for compounding."

It is very difficult to ascertain from where respondent arrives at such a statement. As stated by respondent in the said note 2, p. 9 the law permits compound-

ing of interest when agreed to in writing, but not only does the Agreement not state that interest on installments paid or unpaid may be compounded, but there is no reference to interest in the agreement, as to late payments at all, even if there were late payments which there were not.

From where respondent gets his assertion in the above quotation that the petitioner was the recipient of compound interest, is hard to fathom. It is not only not a fact but there is nothing in the record to even intimate it.

The erroneous assumption of fact, record or evidence is acerbated by the statement on page 9 that petitioner can make no complaint because the agreement to pay interest is in writing and therefore the California constitution is not violated. Nothing is further from the fact or the record. If there were any writing providing for the payment of interest, our whole issue of the use of usurious interest in respondent's computation would be moot. Respondent says on page 9 with reference to the application of seven percent compound interest "Nor can petitioner point to any decision in conflict with the holding below." Of course we do not contend that such interest is unlawful or usurious when stated in writing, *but there is no writing agreeing to pay any interest.* The statement on page 9, Note 2, above quoted, about not being in position to assert Wilshire's objection to payment of interest is indeed very confusing. Wilshire has had no occasion to object, or petitioner to assert such objection for Wilshire, nor has Wilshire objected to being credited by the commissioner in being allowed a tax write-off of interest in the sum of $9,000 per year when total installment payments were $7,500. It's all very bewildering to this writer.

All contention by respondent that the assessment is proper and in conformance with the agreement between the parties, goes up in smoke with his own statement which has the effect of stating that the computation was designed to bring about a predetermined result rather than a compliance with the contract when he says on page 8:

> "This schedule was derived by applying an interest factor to the schedule of payments set out in the 'lease' and working backwards over the term of the lease."

This statement is correct and exactly what petitioner has pointed out in the opening brief, to-wit: that the actuary for the government who testified in the first tax court trial and the actuary who testified for the government in the second trial, testified that they were to establish a fictitious principal and an assumed interest starting back from 1929, so as to achieve the desired result.

Conclusion.

This is an unusual case with unusual proceedings. As pointed out the argument of respondent is based on spurious presumptions of fact, evidence and record. A great and gross injustice to petitioner would result if the decision of the Court of Appeals should become the final Law of the Case, after twenty years of litigation, covering assessment based on computation for years from 1929 on, and on which full one hundred percent tax has already been paid on income as ordinary income up to the time of beginning of this litigation in 1948. The law as enunciated by the Court of Appeals is not in conformity with the law as stated by the various circuits of the Court of Appeals or

this court. There has been a failure of due process in retroactive application of a 1961 decision (*Wilshire*) and a 1964 statute (Sec. 483 of Int. Rev. Code) to income beginning with 1929, which had heretofore been fully paid. We respectfully submit that fairness, justice and maintenance of proper conformity and continuity of the law merits a hearing by this court.

Respectfully submitted,

CHAS. I. ROSIN,

Attorney for Petitioner.